Before the Subcommittee on the Constitution
Of the Judiciary Committee,
U.S. House of Representatives

Testimony of Franklin P. Kottschade
On Behalf of the National Association of Home Builders
In Support of H.R. 4772,
Private Property Rights Implementation Act of 2005

Chairman Chabot, Ranking Member Nadler, and Members of the Subcommittee, my name is Franklin P. Kottschade. I am a home builder and developer from Rochester, Minnesota, and a member of the National Association of Home Builders (NAHB). I am pleased to provide testimony on NAHB's behalf in support of H.R. 4772, *the Private Property Rights Implementation Act of 2005*.

I. Background on NAHB and its Support for Property Rights.

Founded in 1942, NAHB is a federation of more than 800 affiliated state and local building industry associations. It is the voice of the housing industry in the United States. NAHB represents over 225,000 builder and associate members throughout the country, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB's builder members will construct about 80 percent of the more than 1.9 million new housing units projected for 2006, making housing one of the largest engines of economic growth in the United States.

NAHB supports a sensible balance between growth to meet the Nation's housing demands, and protection of the environment and natural resources for future generations of Americans. To achieve that balance, NAHB's members must cooperate with land use officials at all levels of government so that growth proceeds in a planned and orderly manner.

Sometimes land use regulators go too far in placing demands on property owners. It is all too common for government officials to single-out the development community to shoulder the burden of civic improvements which, in all fairness and justice, the public as a whole should bear. Property owners face unfair legal barriers that undercut 42 U.S.C. § 1983 of the Civil Rights Act, which was specifically designed to protect all Americans from actions taken by municipalities "under color of state law" that violate federal constitutional rights. Congress intended for Section 1983 to provide *immediate access* to the federal courts for individuals deprived of their constitutional rights, but this is currently not the case for property owners. NAHB thus has a long tradition of advocacy, before Congress and in the Nation's courts, to establish a judicial system where the federal courts are free and open to robust debate under the Takings Clause—just as they are available to address other fundamental protections in the Bill of Rights.

II. Personal Background

A copy of my résumé is attached at Appendix 1 to this testimony.

I was born and raised on a farm 40 miles north of Rochester, Minnesota. My formal education includes attending a one room country school for eight years, high school, and college, where I paid my way by working highway construction jobs. I met my wife, Bonnie, in college. Bonnie is a retired public health nurse who was employed as a School Nurse by the Olmsted County Public Health Department for thirty-two years. For

the past 39 years, Bonnie and I have lived and raised our family in Rochester (1 boy and 2 girls). Our children attended the Rochester Public Schools before going on to college.

My professional successes have instilled in me a strong commitment to give back to my community, and my résumé provides a list of my civic and charitable activities. These include volunteer participation at the local government level to ensure that municipal services and infrastructure are provided throughout the greater Rochester area. In particular, I have served as Chairman of the Olmsted Facilities Commission, responsible for the development of a new joint City of Rochester/Olmsted County government center. In that capacity I was responsible for every aspect of the public project for over 4½ years, from initial site planning through final construction, which included selection of architects, construction plan review, and management of the competitive bidding process. I was also responsible for site acquisition and land assemblage, where we acquired over 45 separate parcels through eminent domain and conducted individual negotiations with each affected property owner in the condemnation process. I am particularly proud of the fact that not a single property owner resorted to litigation, as they all received fair market value for their land. Additionally, I have served as Chairman of the Olmsted County Physical Development/Infrastructure Focus Group for Strategic Planning, as well as Chairman of the Design and Construction Committee for Rochester School District #535, where I managed capital improvements and renovations for our children's schools. These volunteer opportunities have provided me first-hand knowledge and respect for the challenges faced by local governments to manage growth, while ensuring adequate, available infrastructure to benefit all citizens.

In my professional capacity, I am the President of North American Realty, Inc., a small, Rochester-based development and real estate brokerage company that I incorporated in 1972. During my stewardship at North American Realty, all aspects of the local land use and development process have come across my desk including approvals for site plans, zoning, annexation, layout and engineering, grading plans, service roads, and building construction. North American Realty has provided over 1400 homes for Minnesotans across the economic spectrum, ranging from subdivisions, apartment rentals, seniors housing, mobile homes, to affordable townhouses.

I take very seriously my responsibility to provide the dream of home ownership to the citizens of greater Rochester, and I aspire to build communities that I would want my own children and grandchildren to call home. Indeed, I have always been willing to provide more than my fair share to ensure that the houses I build are integrated with the environment and are completely serviced by all essential infrastructure. Yet, unfortunately, I have been a victim of government abuse in the land-use approval process on occasion. In those circumstances I will do whatever it takes to protect my family's well-being and my economic investment—and that includes litigation.

Filing a lawsuit to safeguard property rights is never a developer's first response. As the adage goes, "Your first lawsuit is your last permit." It is simply a bad business decision to blithely resort to litigation, which creates substantial out-of-pocket costs such as counsel and expert fees, as well as untold projects delays and uncertainty. From my

perspective, initiating suit is the last resort when the development approval process comes to a stalemate, and it is never a winning proposition. I would much prefer to negotiate with local land use officials to ultimately build a project than to sue over it. But sometimes, a property owner has no choice, and litigation may be the final option to protect an investment.

As the Supreme Court stated in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth, should be relegated to the status of a poor relation." It is important to stand firmly on this principle. When I have been a casualty of overly-zealous government regulation that has gone "too far," the federal courts should be available to hear my grievance. My own first-hand experiences, however, have proved to me that this is not the case. Many courts have demeaned property rights as the "poor relation" to which *Dolan* referred.

Accordingly, I strongly urge Congress to enact legislation ensuring that the liberties safeguarded by the Takings Clause can be vindicated in the federal courts. In my opinion, passage of H.R. 4772 is absolutely essential to restore the fundamental rights in private property that have been a bulwark of our democracy since the Nation's founders enacted the Bill of Rights.

III. Recent House of Representatives Efforts to Protect Private Property Rights.

The House of Representatives must be commended for the solid endorsement it recently exhibited towards private property rights when it passed H.R. 4128, *the Home, Small Business, and Private Property Defense Act*. That Act passed the House on November 3, 2005, by an overwhelming margin of 376-38. The first three congressional findings set forth in H.R. 4128 are:

> (1) The right of individuals to own their own homes, farms, small businesses and other types of private property is a fundamental right recognized by the U.S. Constitution and our common law heritage of liberty.
>
> (2) The Fifth Amendment to the U.S. Constitution protects this fundamental right by limiting the condemnation of private property to instances where "just compensation" is provided and independently, where the taking is for "public use."
>
> (3) History demonstrates that protection of property rights is essential to securing other rights and liberties, and violations of property rights often lead to violations of other fundamental rights. The Supreme Court noted that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

These same findings, endorsed with tremendous bipartisan support only a few months ago, could be lifted verbatim to describe H.R. 4772. The catalyst for passing H.R. 4128 last year was the U.S. Supreme Court's decision in *Kelo v. City of New London* (2005). *Kelo* concerned infringements on Fifth Amendment rights when government initiates formal condemnation proceedings to take land from private property owners, in the context of economic development opportunities. The far more pervasive and insidious infringements on property rights occur not when government takes land to *allow* development (as in *Kelo*), but when government regulates land to *stop* development with excessive demands (as in my own and countless other cases). Congress is obviously and rightfully concerned about protections afforded to private property, as evidenced by H.R. 4128's passage. However, Congress is not finishing the job if it ignores the far more common situation of Fifth Amendment takings when government over-regulates private property and treats land as if it were actually condemned, but denies the property owner just compensation.

The very same concerns that mobilized the House to enact H.R. 4128 last year are critical—indeed, more so—with regard to H.R. 4772.

IV. A Brief Overview of the Barriers Preventing Property Owners from Accessing Federal Court

To set the stage for my personal experiences that bring me to support H.R. 4772, it is helpful to provide a brief summary of the legal theories that government agencies have used against me and other property owners to bar federal court hearings on takings claims. Section VII of my testimony beginning on page 18 provides more detail, but an overview is warranted here.

In 1985, the Supreme Court decided the *Williamson County* case, which has been interpreted to require property owners to file and pursue litigation for just compensation in *state* court before filing suit in *federal* court on a Fifth Amendment taking. While *Williamson County* requires initial state court litigation to make a takings claim "ripe" for federal review, the Supreme Court's conflicting *San Remo* (2005) decision provides that takings plaintiffs who bring their claims in state court are precluded from later obtaining federal adjudication. In short, the effect of both *Williamson County* and *San Remo* is: (1) property owners must litigate their constitutional takings case in state court first (under *Williamson County*); but (2) after litigating in state court, they can never have their case heard in federal court (under *San Remo*). Thus, the federal courts are not available to consider, much less protect, private property rights.

While *Williamson County* and *San Remo* effectively block a property owner from bringing a takings claim to federal court, another Supreme Court case, *City of Chicago* (1997), allows local government agencies to remove cases to federal court when they are sued in state court by a takings plaintiff. If government agencies have the option to remove takings cases to federal court, then private property owners, alleging violations of their constitutional rights, should have equal access to a federal forum.

The late Chief Justice Rehnquist, joined by three other concurring Justices, recognized in *San Remo* that there is no sound reason for blocking property owners from federal court because "the affirmative case for the state-litigation requirement has yet to be made." Moreover, the U.S. Supreme Court has never explained "why federal takings claims…should be singled out to be confined to state court, in absence of any asserted justification or congressional directive." In fact, a church, or even an adult book store owner, who challenges a municipal land-use regulation based on the First Amendment's protections has direct access to federal court, while a property owner challenging the same regulation, but raising a Fifth Amendment takings claim, does not. The late Chief Justice also recognized in *San Remo* that "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." As many property owners have learned, takings claims bear the unfortunate, but unique, distinction of never being heard in federal court, unlike any other Bill of Rights guarantee.

As a result, H.R. 4772's jurisdictional reforms are of paramount constitutional importance. They would resolve many of the unfair dichotomies created by the Supreme Court's cases, and ensure that Fifth Amendment property rights are fundamental liberties that the federal courts must address.

V. The City of Rochester Infringed My Constitutional Rights—And the Federal Courts Denied Me the Right to Hear My Case.

One of my particular projects shows all too clearly the problems property owners encounter as they attempt to develop their land. My project's residential component, discussed in greater detail below, contemplated higher-density townhome units that would have added to the City of Rochester's inadequate stock of affordable housing. But the disproportionate and excessive demands sought by the regulators, as pre-conditions to approve my proposal, would have made these lower-priced units economically infeasible to build. My story provides the perfect illustration of why H.R. 4772 is such an important piece of legislation, to ensure that landowners have access to federal courts to vindicate their Fifth Amendment rights when all else fails.

A. The City Imposed Financially Ruinous Demands on My Project.

In 1992, I acquired a 220-acre parcel of land with the intent to develop it. Fourteen years later, I remain entangled in an administrative and legal quagmire with no end in sight. In all this time, I have not been able to build on my property.

Even before I closed on the property back in 1992, I met with City of Rochester planning staff to discuss plans for a shopping center on the parcel's eastern side. Representatives of the Rochester-Olmsted Council of Governments asked me to postpone the plan while they studied traffic needs. Staff was concerned that the premature announcement of the shopping center would trigger land speculation in the area around the development. I obliged, putting my project on hold. My concession here delayed the project for 2½ years.

In 1994, I applied to rezone the eastern part of my property to accommodate the proposed shopping center, but the City denied the application. Staff claimed that the roads were inadequate and could not handle anticipated traffic. Also during this same period, I applied for approval of a townhome development on a 16.4-acre segment of the property, consistent with existing zoning to permit single-family residences and townhomes. Indeed, the City's general land-use plan identified my property as being appropriate for higher density townhome development.

I developed and submitted a General Development Plan to construct 104 townhomes on the 16.4-acre parcel, as the current zoning allowed. Planning department staff recommended approval of the townhome development—but they attached nine excessive, onerous conditions. In a word, these conditions amounted to extortion. Among other things, the City's onerous demands included that I provide a man-made lake, which it thought would be a nice aesthetic enhancement to the site. The problem was that manufacturing such a lake was not the most environmentally sensitive move, because I would have to dredge a low area on the property. While I agreed that I could fabricate the lake as the City requested, the State Department of Natural Resources objected. The State DNR would not agree to any plan that submerged an existing creek into the lake. Thus, between the City's demands for the lake and the State's refusal to let me build it, I wound up in a classic Catch-22.

In addition, the City's planning staff tried to compel me to construct an entirely new frontage road along Highway 63 to accommodate the planned townhomes, resulting from the State's denial of permits for two vehicular access points to my project's commercial component. Because the state denied those access permits, the City now required me to build the new road. I put the project on hold again so I could study whether my proposed townhomes were compatible with the existing road system, and whether a brand new road was truly necessary. I concluded that, out of my original 220 acres, only this 16.4-acre parcel was suitable for a residential project and it was compatible with both existing zoning and the road system. In other words, the current road system could already accommodate the traffic needs generated by the townhomes. The new frontage road the City wanted me to build was excessive and unnecessary. Moreover, while I had a study to prove my position, the City did not, nor did it ever, develop a study to justify its exaction for a new road.

The City's demands did not end there; planning staff continued to focus on traffic patterns and flows. Staff determined that my proposed townhomes *might* be within the right-of-way that the City would need *if* it decided at some point to double the width of an existing road, 40th Street, from two lanes to four. Yet, the City did not have any existing expansion plans for 40th Street. Undaunted, the City notified me that it would require a 50-foot dedication of my property, including the 33 feet already being used as part of the street, to upgrade the roadway. I objected to the additional dedication because the demand was not in proportion to the traffic my project would generate. And, the City had produced no plan or study showing that the dedication was needed from me to accommodate the impacts from my proposed development. I agreed, however, to wait

until the City completed its plans and studies for the putative 40th Street road-widening project.

At this juncture, about eight years had elapsed since I first purchased the land. So in early 2000 I submitted another application, this time for a conditional use permit for the townhome development. As part of my application, I requested information from the City regarding the right-of-way for 40th Street, but the City replied that no road expansion plans were yet available. Although the planning department continued to lack any traffic plans to prove a need or intent to widen the road, staff still insisted it needed a 50-foot dedication from me. Eventually, I obtained a set of plans from the State Department of Transportation. These plans showed the projected roadway as being only 41 feet wide, not the 50 feet as the City insisted. Although my studies showed that my proposed project could be accommodated within the capacity of the existing road system, I acquiesced to a 41-foot dedication for any possible future widening of 40th Street just so I could finally move forward with the townhome plan. But the City held fast to its demand that I dedicate 50 feet, still with no plans or justification whatsoever.

More exactions were thrown at me. The City further conditioned approval on grading the project site to suit its still nonexistent plans for the proposed 40th Street widening. Grading the site as the City demanded would result in a loss of more than three-quarters of the proposed townhomes. Still another condition involved excessive storm water management. While I was fully prepared to meet all regulations to control storm water runoff during my development, the City really wanted ponds for the purpose of a *regional* storm water management facility, so it could address runoff far beyond my project's impacts. Its plan was for me to construct these ponds *for free* and then turn them over to the City, to drain approximately 3,000 acres of nearby lands slated for other construction. The City's scheme was to charge *other* developers of *other* projects about $2,000 per acre for runoff into the ponds that *I* constructed and financed for the community's benefit. The City never intended to reimburse me for the ponds. It simply demanded that I give them away—as a gift—because it wanted them.

At no time did the City or its planning staff provide me with information showing that any of these required conditions were proportional to my project's impacts. As an experienced developer, I was aware of the U.S. Supreme Court's *Dolan* (1994) decision, which allows cities to impose conditions on permit approvals only if they bear a rough proportionality to the burdens that the proposed development would place on the community. Accordingly, I asked the City to explain the nexus of the conditions to my project, and their proportionality to my project's impacts. Indeed, I sent repeated, written requests for this information to the City. The best the City could muster was sheer speculation: its written responses state nothing more than my project "could" possibly generate hypothetical impacts, so the conditions *might be* necessary. Such supposition, without fair studies to back them up, does not satisfy *Dolan*'s requirement that a regulatory body demanding exactions bears the burden to prove rough proportionality between its requested conditions and the nature and extent of the proposed development.

In May 2000, the Planning and Zoning Commission recommended approval of my project subject to the nine onerous conditions sought by staff, even though I demonstrated that those exactions rendered the project economically non-viable. Essentially, all of the City's onerous conditions killed my project. For example, the City's grading and street dedication requirements alone reduced the property's development potential by more than 75%, shrinking the number of townhomes I could build from 104 down to 26. The townhome site backed-up to a floodway, so it was impossible for me to propose design alternatives that would reconfigure placement of the townhomes at different locations. The grading requirements would have increased my per unit costs from $22,378 to nearly $90,000, an over 300% increase in development costs for each townhome. Significantly, the average price for similar units in the Rochester townhome market was $125,000 in 1999 and 2000. The City's conditions also reduced the buildable area of the project from 8.93 acres to 4.93 acres. My plans to construct affordable, workforce housing were destroyed; the City's exactions made it impossible for me to reach the middle income and workforce housing market that I was trying to serve.

The City Council granted my permit with all of the ruinous conditions proposed by the Planning Commission. The Council then denied my requests for variances from the conditions. Months of additional reviews and appeals, to the Common Council and Zoning Board of Appeals, did not change the City's position.

Piled one on top of the other, the City's nine exactions were like Shylock's demands for a pound of flesh. They were grossly out of proportion to impacts my project would have had on existing infrastructure and resources. Such exorbitant development costs meant that I was either forced to elevate home prices out of the relevant market to recoup my expenses, or I would have to absorb the total cost myself. Either way, the nine conditions collectively rendered my project economically infeasible.

Nine years after I purchased the land, I was finally at a stalemate. I truly believed my constitutional rights were violated. I had one option left: in 2001, I filed suit in the U.S. District Court for the District of Minnesota, seeking just compensation for an unconstitutional taking under the Fifth and Fourteenth Amendments.

B. The Federal Courts Refused to Consider My Constitutional Rights.

Even with all I had been through up until this point, I did not undertake litigation cavalierly. I knew that ultimate success on the merits would be a long shot, because the U.S. Supreme Court has set a high bar for property owners to win a takings claim. But I did not want to abandon my project, and at least I thought I'd receive a fair hearing on the merits of my case. I was wrong.

With the federal civil rights statute (42 U.S.C. § 1983) as the vehicle for my suit, in May 2001 I challenged the constitutionality of the exactions the City attached to my permit and requested just compensation under the Fifth and Fourteenth Amendments. The City never even answered my complaint, but responded by filing a motion to dismiss based on two grounds from the Supreme Court's 1985 *Williamson County* decision: (1)

that I failed to get a final decision on the type of development that the City would allow on the property; and (2) that I failed to pursue available state compensation remedies. The overriding legal issue came into focus rather swiftly, and it centered on whether my claims were ripe under *Williamson County* prong 2 because I went to federal court without an initial state court detour. The *merits* of my case, as to whether the City's extortionate demands failed under the U.S Constitution and *Dolan*'s "rough proportionality" standard, were never addressed.

On January 22, 2002, the U.S. District Court for the District of Minnesota agreed with the City and dismissed my case. The court held that until I sought relief in state court, my takings claim was beyond federal court review.

I filed an appeal to the U.S. Court of Appeals for the Eighth Circuit in February 2002, arguing that the Supreme Court's 1997 *City of Chicago* decision modified *Williamson County* so that the doors of the federal courthouse must be open to my complaint. In *City of Chicago,* the Court concluded that government *defendants* could remove constitutional land-use cases from state court to federal court, as a matter of course. Indeed, the premise of the federal removal statute at issue in *City of Chicago* is that cases can be removed from state to federal court, but only if they could be brought in federal court *originally*. The inexorable conclusion from *City of Chicago* is that because a municipal defendant could remove a takings case to federal court, then a takings plaintiff—such as myself—must be allowed to bring a Fifth Amendment claim in federal court *originally*.

Thus, before the Eighth Circuit I argued that if government had the right to remove a constitutional land-use case to federal court, then as the aggrieved party, I should be able to bring my case to federal court in the first instance without going to state court first. My claim obviously arose under federal law, and the federal courts exist precisely to hear and decide federal claims. Moreover, I filed initially in federal court because I wanted to avoid the inevitable trap that other takings plaintiffs routinely face when they sue in state court first. If I had initially brought my claim in state court and lost, I *never* would have been able to access the federal courts because they would have afforded full faith and credit to the prior state judgment. A subsequent federal judge would have invoked the doctrines of claim preclusion (res judicata) and/or issue preclusion (collateral estoppel) to bar relitigation following any state judgment I would have received. I explained this conundrum in my litigation papers to the Eighth Circuit.

The court was not sympathetic. The decision it reached in my case is captioned *Kottschade v. City of Rochester,* and is reported at 319 F.3d 1038 (8th Cir. 2003). The Eighth Circuit affirmed the district court's previous dismissal, holding that, because I did not exhaust my state court remedies, I could not bring my takings claim in federal court. The Eighth Circuit acknowledged that the interplay between *Williamson County* and *City of Chicago* created an "anomalous gap" in takings case law that only the U.S. Supreme Court could fill, "not us." In its opinion dismissing my case, the Eighth Circuit clearly recognized that claimants such as me, who are required to seek a remedy in state court, are "altogether denied a federal forum for what is undoubtedly a federal right."

With regard to the dilemmas I would have faced under claim and issue preclusion had I initially filed in state court, the Eighth Circuit acknowledged my argument "has the virtue of logic and is tempting," but declined to accept it. The appeals court stated, "The point is this: it is simply too early to say now exactly [how a] res judicata or collateral estoppel argument might be appropriate in the future, and exactly what the answers to any such argument might be." But the handwriting was clearly on the wall. The Eighth Circuit knew my chances for federal adjudication would be doomed if I repaired to state court initially. I would have become another hapless victim of the preclusion doctrines, like the long line of takings plaintiffs both before me and since.

Recognizing the anomaly between the Supreme Court's holdings in *Williamson County* and *City of Chicago,* the Eighth Circuit remarked, "We understand that deferring a decision on this point is frustrating to the plaintiff, but the federal courts do not sit to decide questions in the abstract. If the plaintiff goes to the state courts and loses, and then files a 42 U.S.C. § 1983 action in a federal court, that court, subject to appropriate appellate review, will be in a much better position to determine the effect of the prior state-court adjudication."

The Eighth Circuit noted that if I lost at the state court level, I could obtain Supreme Court review on the merits that would afford me a federal forum to address this issue. However, during the appellate oral argument, even one of the circuit judges acknowledged that getting the U.S. Supreme Court to accept my case would be like winning the lottery, given the minuscule fraction of petitions that the high Court grants each year. In any event, with no place left to go, after I lost at the Eighth Circuit I did, in fact, seek U.S. Supreme Court review.

In my petition for certiorari, I asked the Supreme Court to resolve the conflict created by its previous takings decisions. *Williamson County* bars landowners – the aggrieved parties – from bringing federal claims in federal court. Standing in stark contrast is *City of Chicago,* which allows defendants, *in the exact same cases,* to force landowners into federal court on the theory that plaintiffs *could have sued there first*, despite the *Williamson County* barricade. Unfortunately, in October 2003, the Court denied my petition, thereby refusing to clarify its own decisional anomaly.

C. The Ironic Aftermath.

1. The Eight Circuit Has Locked the Federal Court House Doors, and Thrown Away the Key.

In an ironic twist of fate, the Eighth Circuit did indeed receive another opportunity to examine a federal takings claim several years after mine, in a 2006 case captioned, *Koscielski v. City of Minneapolis.* Unlike me, that other Minnesota plaintiff filed his takings suit *initially in state court* challenging a zoning ordinance that restricted the use of his property as a firearms dealership. In other words, Mr. Koscielski's case arose precisely in the procedural posture that the Eighth Circuit sought in my case in terms of initial state court litigation with federal access sought thereafter.

À la *City of Chicago*, the City of Minneapolis removed the action from state court to federal court. Once in federal court, the City filed a motion for summary judgment to dismiss the case. The federal district court granted the City's motion, finding that the plaintiff's takings claim was not ripe for adjudication. The district court found it unripe because the plaintiff did not exhaust state court compensation procedures as required by the *Williamson County* decision. The district court case is reported at 393 F. Supp. 2d 811 (D. Minn. 2005).

Like me, Mr. Koscielski filed an appeal to the Eighth Circuit. In its January 2006 opinion, not only did the Eighth Circuit rule *against* Mr. Koscielski, but it cited *my* case as one of its bases for dismissal because the plaintiff did not pursue litigation in state court. But how could he? He started in state court, the city next removed to federal court—and then the city had the nerve to ask for dismissal of the federal action because there was no prior state ripening suit. And most shockingly, the Eighth Circuit had even more nerve to grant the dismissal! The caption for this case is *Koscielski v. City of Minneapolis*, and is reported at 435 F.3d 898 (8th Cir. 2006).

Please recall that, as I mentioned above, the Eighth Circuit refused to entertain my arguments because it did not know how it would address a situation where a takings plaintiff started suit in state court. I filed originally in federal court, and the Eighth Circuit's decision in my case appeared to leave the federal court door open just a crack, allowing the possibility for ultimate federal review after state takings litigation comes to a close. The *Koscielski* decision obliterated any of those delusions. Simply put, under the current case law it is utterly impossible for any property owners within the Eighth Circuit—covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota—to ever vindicate their Fifth Amendment property rights in a federal court, regardless of whether they file suit initially in federal or state court.

Our judicial system is supposed to be based on fairness, yet the system is decidedly not fair to property owners. Americans should not be put through the judicial wringer only to learn that the federal courts have abdicated their traditional role as guardians of the Constitution. Now, property owners are being forced on wild goose chases through our courts, with no meaningful recourse. Certainly, municipalities realize that gaming the system, as was done in Mr. Koscielski's case, will serve to deter property owners from ever bringing takings claims anywhere, in state or federal court. While some property owners may have the will and financial resources to persevere with litigation in the face of these obstacles, most Americans will have no choice but to give up. Perhaps that is exactly the hope of the government—to misuse jurisdictional rules so their conduct is immune from judicial scrutiny under the Fifth and Fourteenth Amendments.

2. *Kelo* Meets *Kottschade.*

The twists don't end quite yet. There is an epilogue to my own case. Call this next phase, *Kelo* meets *Kottschade.* Like Mrs. Kelo, the government's eminent domain authority has further chipped away at whatever property rights I may have left.

While I was waiting to see if the U.S. Supreme Court accepted my case, in March 2003 the Minnesota Department of Transportation (MnDOT) filed formal condemnation proceedings against my property in state court, under its eminent domain powers. Not only did MnDOT condemn part of the 16.4-acre parcel I had attempted to use for the townhomes, it included additional acreage as well, with the total amount of condemned land about 28 acres. MnDOT then took title to all of it.

The State valued my land that it had condemned at about $875,000, or roughly ten cents on the dollar of its actual value. My experts and I disagreed with MnDOT's appraisal; we believed that costs of filling the site alone will exceed $875,000 (in order to match the new elevations of the road.) With the relocation of road, filling, other site changes and the value of land, we believe that just compensation should be in the range of $8 million. When we asked MnDOT to explain the basis for its lowball figure, the State freely admitted that my property values were depressed due to *the very same development limitations imposed by the City of Rochester to begin with.*

In other words, the City had first imposed unconstitutional conditions on my property to limit its development potential, but conditions were immune to federal court review. Then the State used those same conditions against me—which I wanted to challenge as unconstitutional, but was deprived that opportunity in federal court—as a condemnation windfall to snatch-up my land at a bargain basement price. As a property owner who has worked for years within the rules of the land development arena, how could the Fifth Amendment's Takings Clause countenance such an abuse? And why am I not able to have a federal court consider these gross injustices?

I have reserved my rights to challenge MnDOT's valuation of my property. But I am still waiting, some three years later, to appear before the court appointed commissioner who will "hear testimony" from all sides regarding valuation. I must still go through the trial phase after that. Essentially, the State of Minnesota is claiming that my property has minimal value because I cannot develop it anyway. What better way for government to acquire land cheaply than to condemn it after its development potential is destroyed by regulatory conditions? It's as if the government is clipping coupons as it drags its feet through this whole process, but meanwhile, it has wrested land title away from me. None of this can be heard or decided by a federal court under the Supreme Court's current case law.

There's still more. It gets better or worse depending on your perspective. If I am yet to use my property for a mixed residential and commercial project, the City will require me to enter into a Development Agreement. Essentially, such an agreement would be a contract between me and the City setting forth the terms and conditions of the project, and the Agreement becomes final only after it is authorized by the Rochester City Council and executed by the Rochester Mayor and City Clerk. Improvements to and rights-of-way for 40th Street and its connector roads remain an issue. One of the terms of the draft agreement that the City itself has proposed is that, should I receive

condemnation dollars from MnDOT, I would then have to give some of that money back to the City because it would have required me to dedicate the land to it in the first place.

Let me repeat that: Assuming I receive money from the State to compensate me for the value of my land in the eminent domain proceedings—which has been lowballed because the City imposed excessive conditions that reduced the land's development potential—the City wants *me* to pay *it* some of those compensation dollars because it would have required me to dedicate that land anyway—*even though the dedication it demanded is excessive, extortionate, lacks proportionality, violates Fifth Amendment standards and escapes federal court review.* I invite the Subcommittee to ground truth all of this by reference to pages 7-8, sub¶ (c) of the latest Draft Development Agreement proposed by the City, excerpts of which are attached at Appendix 2.

Yes, the City wants me to pay *it* for land that it has taken from *me.* I could not conjure more blatant government disregard for the U.S. Constitution. The scheming between the City of Rochester and the State of Minnesota has reduced the Takings Clause to a funneling mechanism that diverts just compensation from the coffers of one regulatory body to another. That is simply utter disdain for the Bill of Rights.

Meanwhile, the City of Rochester has levied a property tax assessment against my land for over $1.7 million dollars. The City claims that, because MnDOT initially denied my driveway permits, the new road construction (for which my land has been condemned in the MnDOT eminent domain proceedings) will now provide access to the site, and therefore my property should be assessed at a higher value. So, in a perverse new twist, my property is under siege as the result of a tax assessment which, if I don't pay, will cause me to forfeit the land altogether. And while the City claims my land has increased in value because the State's condemnation will provide road access to my site, the State claims my land has fallen in value because the City's excessive conditions drastically reduced the site's development potential. It's hard to figure out which was is up and which is down, but it is clear that two different levels of government are wielding their regulatory authority and playing off each other so as to impair my land's productive value. In any event, I am challenging the City's property tax assessment in state court, where we are in the midst of discovery.

Thus, my case did not end nine years after I first purchased the land, when the Supreme Court denied my petition, which was bad enough. Rather, with the commencement of the state condemnation proceedings and continued negotiations on the Development Agreement, my case has now lasted *more than 14 years,* with no end in sight. I'm lucky if I receive "just" compensation for my devalued property without giving some of it back to the City, whether in the context of the condemnation or as a result of its tax assessment.

And I will *never* have the chance for a federal court to consider any of this. That is, unless Congress enacts H.R. 4772.

VI. An Exhaustive Survey of Takings Cases Reveals the Federal Judiciary's Contempt for Fifth Amendment Takings Cases.

While I do believe my ordeal is extreme, I am not unique. Studies undertaken by NAHB have shown that, for many years, property owners have been objects of disdain in the lower federal courts. As discussed below, Congress has overwhelming evidence exhibiting the serious problem in the federal judiciary with regard to its hostile treatment of property rights claims. H.R. 4772 is desperately needed to ensure that the Takings Clause is not effectively stricken from the Bill of Rights.

NAHB has compiled data on lower federal court cases decided from January 1990 to May 2006, wherein a regulatory takings claim was brought by a property owner or developer against a local land use regulatory agency. This compilation is attached at Appendix 3 to this testimony. The ultimate goal was for NAHB to draw conclusions about the extent to which the U.S. Supreme Court's decision in *Williamson County* has limited or completely eliminated merits adjudication by the lower courts of Fifth Amendment takings claims.

The compilation shows that over the last 15½ years, the U.S. district and circuit courts have vilified property rights cases. In that time period, an overwhelming majority of regulatory takings cases have been dismissed on jurisdictional grounds and most property owners have been denied the opportunity to have the merits of their federal constitutional claims heard in federal court. While a few takings cases overcome jurisdictional hurdles, it is clear that the confusion about access to federal courts has caused many years of expensive and duplicative litigation. The compilation of cases shows that the *Williamson County* ripeness rules have indeed changed the face of Fifth Amendment litigation for the worse.

A. Compilation Methodology

The research for this compilation was conducted in two parts. The first survey was completed by the law firm of Linowes & Blocher, LLP in 1998 and 1999, and provided case data from 1990 – 1998. The results of that survey have been published. *See* John Delaney and Duane Desiderio, *Who Will Clean Up the Ripeness Mess? A Call for Reform So Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999). NAHB presented this information during the hearings and discussions that ultimately led to the House of Representatives' passage of H.R. 1534, the Private Property Rights Implementation Act of 1997 in the 105th Congress, and H.R. 2372, the Private Property Rights Implementation Act of 2000 in the 106th Congress. Both of those bills would have removed the requirements that a property owner must first repair to state court for a takings claim, and would have confirmed that the federal courts must assert jurisdiction in Fifth Amendment property rights cases.

As a supplement to the 1999 survey, a second survey was completed in May 2006 by the law firm of Shipman & Goodwin, LLP. The 2006 survey sought to replicate the search terms and methodology of the 1999 survey, as closely as possible. The May 2006

study excludes any cases from the 1999 study that continued to proceed through the federal courts after research for the first survey had concluded.

The number of cases brought over the last 15 years in lower federal courts that include some form of Fifth Amendment takings claim is in the thousands. However, for purposes of this compilation, "regulatory takings cases" were defined as those cases where property owners sought some kind of approval or permit from a non-federal land-use regulatory agency to allow development or construction on their property—such as for a retirement home, low-income housing project, home remodeling, residential subdivision, and related infrastructure—but were unable to do so based on action or inaction by the government entity. In short, the cases cited in the compilation are limited to as-applied challenges to land use regulation under the federal takings clause. Additionally, to determine whether *Williamson County* has had any impact on the ability of property owners to reach federal courts, the compilation does not include cases in which there was an independent basis for federal court jurisdiction, such as adult-use cases brought through the First Amendment, cases in which the District of Columbia was a defendant, Lake Tahoe Interstate Compact cases, and cases where the taking claim was clearly incidental to the other federal claims.[1]

Research for the compilation was conducted in Westlaw and Lexis, two major legal research engines. Even though district courts frequently dismiss relevant cases without publishing their decisions in the official reporters, the cases in this compilation include both published and unpublished decisions for the purpose of tabulating results, not for citing unpublished cases as precedent.

B. Compilation Data Summary

161 cases met the criteria outlined above. Federal courts failed to reach the merits of the regulatory takings claim in 132 of the 161 cases. ***In other words, 82% of the time, property owners are unable to get any federal court to even look at whether their 5th Amendment rights have been violated.***

The reasons cited by the courts for dismissing the regulatory takings claims confirm that *Williamson County* is in fact responsible for the inability of property owners to have their federal claims heard in federal court. Of the 132 dismissed cases, 91% of them were on the grounds directly from the *Williamson County* decision: (1) failure to exhaust state compensation remedies, particularly state court litigation on an inverse condemnation claim; (2) no final agency action; or (3) both of these reasons. While not directly

[1] Takings cases were excluded from the compilation if they: (1) lacked a request for approval or permit for development, construction or rehabilitation (for example, a request to change the use of an existing building or business operation); (2) concerned facial challenges to land use regulations; (3) related only to physical takings; (4) arose in the context of eminent domain proceedings or where valuation was in question and liability was not at issue; (5) related to actions by the federal government, an interstate agency, or the District of Columbia; (6) did not involve real property (such as IOLTA cases involving lawyer trust fund monies); and (7) arose in the context where the federal court did not rule on the takings claim, either as to jurisdiction or merits (even though other constitutional provisions, such as the Due Process Clause, the Equal Protection Clause, or the First Amendment, may have been decided).

addressed under the Supreme Court's ripeness requirements, 9% of the dismissed cases were dismissed as a direct result of having litigated in state court as required by *Williamson County*, or having the specter of state court litigation looming, either: (1) on abstention grounds; (2) by applying the preclusion doctrines of res judicata or collateral estoppel; or (3) based on the Rooker-Feldman doctrine.

Table 1

Circuit	Claims Dismissed	% of Claims Dismissed in Circuit	Claims Decided on Merits	% of Claims Decided in Circuit	Case Totals	Circuit% of Total Cases
1st	9	82%	2	18%	**11**	**6.8 %**
2nd	16	89%	2	11%	**18**	**11.2 %**
3rd	6	60%	4	40%	**10**	**6.2 %**
4th	9	90%	1	10%	**10**	**6.2 %**
5th	13	81%	3	19%	**16**	**9.9 %**
6th	20	87%	3	13%	**23**	**14.3 %**
7th	16	89%	2	11%	**18**	**11.2 %**
8th	4	57%	3	43%	**7**	**4.3 %**
9th	13	72%	5	28%	**18**	**11.2 %**
10th	12	92%	1	8%	**13**	**8.0 %**
11th	14	82%	3	18%	**17**	**10.6 %**
DC	0	0%	0	0%	**0**	**0.0 %**
Total Cases	**132**		**29**		**161**	
% of Total Cases	**82.0%**		**18.0%**			**100%**

Looking at the data from a different angle, the surveys sorted the cases in terms of federal district and appellate courts. One major concern is that property owners and developers can have financial difficulty merely surviving the first round of takings litigation in district courts. Only 6.8% cases (11 out of 161) were decided on the merits at the district court level.

An even fewer number of takings litigants have the financial wherewithal to pay for more legal fees to fund an appeal—only to gamble that a federal appellate judge will simply find their claim ripe and require more litigation before reaching the merits and awarding damages. In fact, even though an overwhelming number of cases were dismissed by the district court, only 57% of the total cases (91 out of 161) were appealed. And the gamble paid off for only 20% of the property owners (18 out of 91)—the merits

were still not reached in 80% of cases (73 out of 91) that made it to the federal appellate courts.

Only 18% of regulatory takings cases (29 out of 161) found either a district or appellate court dealing with the merits of a property owner's takings claim. It is difficult to discern a pattern or reason for why these cases reached the merits and the other 82% did not after *Williamson County*. In general, it appears that: (1) the property owner had reserved its federal claim in prior proceedings and the court honored that reservation; (2) the governmental defendant, for whatever reason, did not object to consideration of the merits; or (3) the court addressed the merits of its own volition because it thought the claim was especially strong or especially weak. However, as has been pointed out previously in this testimony, under the U.S. Supreme Court's 2005 decision in *San Remo,* these merits adjudications *should not occur in the future*. *San Remo* held that both state and federal takings claims must now be brought "simultaneously" in state court; federal claims may not be reserved during state court proceedings; and once a state law claim has been decided, state law preclusion rules apply to the federal claim.

While having an inverse condemnation case actually decided on the merits is a primary goal of property owners and developers, the histories of these cases provide a second concern about *Williamson County*'s effect on 5th Amendment litigation. Inverse condemnation cases can take many years to litigate because it is not clear to either property owners or the courts whether or how to adjudicate federal regulatory takings claims. And even though an appellate court finds that a claim is ripe after being dismissed by a district court, a property owner may be forced to underwrite additional litigation to determine whether or not a taking occurred on the merits—in other words, to litigate in the federal trial court, bring an appeal, and then *return* to the federal trial court to decide whether any compensation would be due.

Of those 18 appellate cases where takings claims were found ripe or where the merits were reached, it took property owners, on the average, approximately 9.1 years to have a federal court reach its final determination. These landowners thus endured almost a decade of negotiation and litigation to obtain a judicial determination that their takings arguments could be heard on the merits.

Looking to the overall picture of regulatory takings litigation since *Williamson County*, one striking difference between the 1999 survey and the May 2006 survey is the speed with which federal courts are dismissing federal claims. The 1999 survey clearly revealed property owners fighting for years for an adjudication of their Fifth Amendment taking claims, simply not believing it was possible for their federal claim to be premature before they went to state court but extinguished after they had been to state court. Only 4 of the 85 cases in the May 2006 survey reflect a litigant starting in state court under state law, losing, and then trying to proceed in federal court—the scenario prescribed by *Williamson County*. It seems that a majority of property owners are opting either to proceed in state court only, dispensing with their federal claims altogether, or to proceed in federal court with claims other than regulatory takings when dismissed by the court.

The compilation of data from NAHB's surveys speaks for itself. There is no question that constitutional property rights are being ignored by the federal courts. This data provides a clarion call for Congress to act now. It must pass H.R. 4772 before the Takings Clause is excised from the constitutional landscape.

VII. Congressional Action is Needed to Clean-Up the Ripeness Mess.

Takings law, in all its dimensions, is notoriously chaotic. The Supreme Court itself has issued takings decisions that are difficult if not impossible to reconcile. With lack of coherence and guidance from the high Court, rampant confusion in the lower federal courts has been the predictable result. The time is ripe for Congress to clean up the ripeness mess.

As opportunities have arisen I have urged the federal courts to confront the glaring injustices that flow from *Williamson County*'s doctrine requiring initial state court litigation for Fifth Amendment claims. As discussed above, on June 19, 2003, I requested the Supreme Court to tackle the problem in my own case, through a petition for writ of certiorari in *Kottschade v. City of Rochester,* No. 02-1848, which is attached as Appendix 4 to this testimony. I was proud to have received tremendous support from a number of amicus briefs, including one filed by Chairman Chabot, as well as from other small property owners, think-tanks, and a broad spectrum of trade associations representing a wide array of constituents. In addition, Daniel R. Mandelker from the University of Washington at St. Louis, perhaps the pre-eminent land use professor in the United States, submitted an amicus brief on my behalf. Indeed, Professor Mandelker has previously testified before Congress urging the need to reform takings jurisdictional rules stemming from *Williamson County.* Unfortunately, on October 6, 2003, the Supreme Court denied my petition.

I next assumed the role as an amicus myself, to support other property owners confronting the same jurisdictional dilemmas. At my own expense, I submitted an amicus brief before the U.S. Supreme Court in the *San Remo* case, which is part of the docket for Case No. 04-340. Most recently, I supported the property owners in an appeal before the First Circuit in *Torromeo, et al., v. Town of Fremont,* Civil No. 04-2547. This written testimony is the next step in my advocacy efforts to ensure that property owners have fair access to federal courts.

While more detail is provided in my attached Supreme Court petition, I take this opportunity to summarize some of the more perplexing and unfair facets of the current case law which impedes federal court jurisdiction over Fifth Amendment claims.

A. The *Williamson County* and *San Remo* Decisions Contradict Each Other.

Williamson County held that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s],

its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied).[2] However, the full Court's opinion in *San Remo* declares that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" . . . does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 125 S.Ct. at 2506 (citing *Williamson County*, 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson County* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

How do these rules square with each other? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until after the state denies compensation? What happens in those state courts that refuse to entertain federal takings claims until compensation is finally denied under state law? *See, e.g., Breneric Assoc. v. City of Del Mar*, 81 Cal Rprtr. 2d, 324, 338-339 (Cal. App. 4th 1998); *Melillo v. City of New Haven*, 732 A.2d 133, 138 n. 28 (Conn. 1999). How does the simultaneous claim rule work in states whose law provides that a federal takings claim simply can not be joined with a state law claim in state court? See *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989).

There is no realistic opportunity that the federal and state courts will suddenly bring order to the chaos they have created. Congress must act by promulgating H.R. 4772 to clarify the rules of federal court jurisdiction over takings claims.

B. The Court's Rules on Removal Jurisdiction Load the Deck Against Property Owners.

As discussed above, *Williamson County*'s state-litigation rule is irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson County*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of the federal district courts." *Id.* at 528-

[2] *See also Williamson County*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so"); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available State] procedure and been denied just compensation").

529. Under the federal removal statute,[3] a case can be removed from state to federal court only if it could have been brought in federal court originally.

Under *Williamson County*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago*, federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims at the whim of a municipal defendant who decides to exercise the removal option.

At least two federal circuits have taken *Williamson County* and *City of Chicago* to their illogical extreme. Earlier in my testimony, I discussed a recent decision where the Eighth Circuit held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this case is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court—and then argue for dismissal because *Williamson County's* state-litigation rule went unsatisfied. The court elevated form over substance to absurd heights and dismissed the case. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. Congress must enact H.R. 4772 to correct the mockery that municipal defendants have made of the federal statutes governing removal jurisdiction and district court jurisdiction over constitutional claims.

C. Some Lower Courts Apply the State-Litigation Rule to Other Constitutional Claims.

The lower federal courts have clashed as to whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Some circuits restrict

[3] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant . . . to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

Williamson County's state remedies requirement to takings claims only.[4] However, the Seventh Circuit, in parsing a land owner's §1983 claims, held that *Williamson County* state procedures apply to takings and due process, but not equal protection. See *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state inverse condemnation claims must be exhausted for *either* a federal takings *or* a due process claim, without opining on equal protection. *See Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). The Second Circuit has extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. See *Dougherty v. Town of No. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

Accordingly, the state-litigation rule has reached beyond the Takings Clause and has infected the Due Process and Equal Protection Clauses as well. To avoid any further damage to property owners' constitutional rights, I urge Congress to eradicate the state-litigation rule once and for all by enacting H.R. 4772.

D. Impact on Seventh Amendment Rights to a Jury Trial.

The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). There, the Supreme Court held that takings plaintiffs in Section 1983 litigation have a 7th Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit regulatory takings liability issues to juries. *Id.* at 719. If *Williamson County* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the 7th Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, *see Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes*, 526 U.S. at 719. Congress's attention is thus required not only to protect property owners' rights under the Takings Clause, but also their 7th Amendment guarantee to jury trials. H.R. 4772 will ensure that all of those fundamental rights are preserved.

[4] *See, e.g., County Concrete Corp. v. T'ship of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellant's facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

E. Because of the State-Litigation Rule, the Takings Clause is the Only Bill of Rights Provision Barred from Federal Court Review.

The opinion for the Court in *San Remo* "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. . . ." *San Remo,* 125 S.Ct at 2509 (Rehnquist, C.J., concurring.). This is exactly what has transpired. As shown earlier in Section VI and in the survey attached at Appendix 3, the lower federal courts overwhelmingly invoke the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. As Professor Mandelker previously testified to Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoiding the vast majority of takings cases on their merits." Testimony of Daniel Mandelker on H.R. 1534, Before the House Judiciary Comm., Subcomm. on Courts and Intellectual Property, reprinted at 31 Urb. Law. 234, 236 (Spring 1999). Adding insult to injury, once a property owner sues in state court, any hope for ultimate federal court review is dashed because the preclusion doctrines afford full faith and credit to the prior state judgment:

> Thus, as a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County,* property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases At Long Last Reaches The Self-Parody Stage,* 36 Urb. Law. 671, 687 (Fall 2004).

With Fifth Amendment claims consigned to state court, whether by virtue of *Williamson*'s state-litigation rule or *San Remo*'s concurrent claims rule, the result is that citizens are denied *substantive* protections of the United States Constitution. Many state courts decline to rely upon or adhere to Fifth Amendment standards to adjudicate property rights claims. *See, e.g. Santini v. Conn. Hazardous Waste Mgmt. Serv.* 739 A.2d 680, 688 n. 20 (Conn. 1999), *cert. denied,* 539 U.S. 1225 (2000) (U.S. Supreme Court precedent is "irrelevant" to adjudicate takings claimant's property rights, and rejecting the argument that the Fifth Amendment establishes a minimum, national standards for adjudicating a takings claim brought under the Connecticut Constitution); *State v. Ball,* 471 A.2d 347, 351-352 (N.H. 1983) ("[T]he right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees"; any federal precedent is "merely . . . guidance" and "our results [are not] bound by those decisions"). *See generally* R. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523 (1995)**.** Thus, the state-litigation rule has not simply denied takings plaintiffs a federal forum, but also *adjudications that employ federal standards.*

Furthermore, in denying Fifth Amendment claimants access to federal courts, *Williamson* has gutted the critical role of the federal judiciary under 42 U.S.C. § 1983, to oversee and correct actions taken by municipalities "under color of state law" that violate federal civil rights. The "central purpose" of Section 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors," *Felder v. Casey*, 487 U.S. 131, 141 (1988), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Congress intended for Section 1983 to provide "*immediate access* to the federal courts" and "throw open the doors of the United States courts" for individuals deprived of their constitutional rights. *Patsy v. Fl. Bd. of Regents*, 457 U.S. 496, 504 (1982) (emphasis supplied).

Congress's intent behind Section 1983, in allowing immediate federal court access for constitutional claims, has been eviscerated by *Williamson County* and *San Remo.* I urge Congress to enact H.R. 4772 swiftly to put the federal courts back on the constitutional track of protecting property rights.

VIII. Conclusion

I firmly believe that *Williamson County*'s state litigation requirement voids the Fifth and Fourteenth Amendment protections for property owners. I note with irony that on the website for the U.S. federal courts, www.uscourts.gov, it reads that "[t]he federal courts often are called the guardians of the Constitution because their rulings protect rights and liberties guaranteed by the Constitution." Unfortunately, I know this is not true, from my own person experience, when it comes to property rights—the federal courts, wrongly so, have abdicated their responsibility to protect property owners. The data compiled in NAHB's 1999 and 2006 surveys unequivocally backs-up my belief.

Moreover, there is no constitutional basis for the state-litigation requirement. It is a prudential standard, as affirmed by the Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997). Regardless, this prudential standard has spun out of control. The late Chief Justice Rehnquist, who was joined by three other Justices, wrote in his concurrence in *San Remo* that "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."

If you follow the argument by some that our Fifth Amendment rights are not violated until we are denied just compensation in state court, then this same rationale should also apply to our other civil rights. For example, if a municipal police officer conducts an illegal search, are our Fourth Amendment rights not infringed until we go first to state court to determine whether the police officer had probable cause? We know the answer is no, because no such standard exists for Fourth Amendment cases, and rightfully so. As the late Justice Brennan, both a defender of property rights and a protector of local government authority, wrote: "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego,* 451 U.S. 621, 661 n. 26 (1981) (Brennan, J., dissenting). H.R. 4772 does not provide

special rights for Fifth Amendment claims. It merely puts Fifth Amendment takings claims on par with the rest of the Bill of Rights.

Looking at the mess that has been created in the takings jurisdiction arena, Congress must pass this legislation to restore the U.S. District Courts as the appropriate venue to adjudicate federal constitutional issues. I urge Congress to pass H.R. 4772.

Appendices

NOTE: This draft Development Agreement for the Property does not constitute an Official Document of the City of Rochester until approved as to form by the City Attorney and authorized by the Rochester City Council for execution by the Rochester Mayor and City Clerk.

DRAFT DEVELOPMENT AGREEMENT

Willow Commons Development
GDP #03-214

5/28/04

THIS AGREEMENT, is made as of this ____ day of _____, 2003, by and between SJC Corporation a Minnesota corporation, B & F Properties LLC a Limited Liability Company, Willow Creek Commons LLC a Limited Liability Company, Frank and Bonnie Kottschade husband and wife, (hereinafter jointly referred to as "Owner"), and the **City of Rochester**, a Minnesota municipal corporation (hereinafter referred to as the "City").

WHEREAS, Owner owns and desires to develop real property within the City of Rochester, Olmsted County, Minnesota, as a residential and commercial development, which property is described and shown on **Exhibit 'A' attached hereto and incorporated herein**, and is hereinafter referred to as the "Project" or the "Property," depending on the context in which it is used; and

WHEREAS, Owner and City agree that a development agreement will serve to facilitate the orderly and efficient development of the Property to the mutual benefit of the Owner, the City, and abutting property owners; and

WHEREAS, the Owner acknowledges that the proposed Project may impact the adjacent, and in some cases, inadequate public infrastructure controlled by the City, the County, and the State.

WHEREAS, the City, County, and State have outlined certain public improvements and/or facilities which in part provides needed infrastructure for the development of the Owner's Property.

WHEREAS, the City has outlined, planned, or constructed certain public improvements and/or facilities which, in part, provide needed infrastructure for the development of the Property; and

WHEREAS, Owner desires to begin the Project prior to many of the necessary improvements to the existing infrastructure being in place; and

WHEREAS, City agrees to allow the development of the Property to proceed subject to the execution of this agreement and other permits and approvals as may be required by City Ordinances that addresses the impacts of the Project on the public infrastructure.

NOW, THEREFORE, in consideration of the mutual benefits to the parties set forth herein, and other good and valuable consideration, the adequacy of which is hereby acknowledged, Owner and City agree as follows:

OWNER'S OBLIGATIONS

1) **Annexation. NA**

2) **Property Development**. By execution of this Agreement Owner agrees to proceed and may complete the platting/project approval process including plat recording for the Property prior to the construction of the infrastructure being completed as provided for in Sections 61.246 - 61.254 of the Rochester Zoning Ordinance and Land Development Manual. Owner agrees to plat and complete the construction of the entire Project as shown on the approved General Development Plan #03-214 and the Conditional Use Permit #03-46, or as may be amended on the Final Plat for this Property, within five (5) years of execution of this Agreement. Owner also agrees to the following provisions:

   a) To extend the public infrastructure to the adjoining property as reflected on General Development Plan or as directed by the City Engineer within five (5) years of the date of this Agreement, or

   b) If Owner does not extend the public infrastructure as outlined in 2a. above Owner agrees to escrow sufficient funds with the City of Rochester, in an amount determined by the City Engineer, within five (5) years from the date of this agreement for use by the City to extend the public infrastructure to the adjoining property, or

   c) In the event City of Rochester receives a petition to extend public infrastructure through Owner's Property to serve adjoining properties, Owner agrees to execute a City prepared Contribution Agreement detailing Owners proportional cost for the extension within 30 days of written notification by the City, and

   d) Dedicate to the City, within five (5) years of the date of this Agreement or within 90 days of written request of the City Engineer, utility and roadway easements as determined by the City Engineer necessary to extend the public infrastructure to the adjoining properties as reflected on the General Development Plan for the Property.

City/Owner Contract. Owner shall execute a "City/Owner Contract" with the City prior to constructing any public infrastructure (including but not limited to grading of public storm water facilities, roadways, watermain, sanitary sewer and storm sewer to serve the Property), and prior to the final grading of the Property. Owner shall pay for all public improvements authorized for construction by the City/Owner Contract unless otherwise stated in the City Owner Contract.

3) **Grading and Drainage.** Owner agrees to have a Drainage Report and Grading Plan prepared by a professional engineer and to submit these documents to the City Engineer for approval prior to the commencement of any grading activity on the Property. Owner also agrees to the following additional provisions:

   a) Owner agrees to grade the Property to match the future grades of the abutting 40th Street SW and TH 63 roadways, needed for the phase of development abutting the roadways.

   b) Owner also agrees to match the existing or otherwise City approved grades of the abutting property to the south and west unless other documented arrangements are made with the abutting landowner and approved by the City on the Grading Plan. A copy of the written agreement between the Owner and an abutting property owner(s) shall be provided to the City Engineer prior to the City's final approval of the Grading Plan.

   c) Owner agrees to provide to the City surety for the restoration of the disturbed areas in a form and amount acceptable to the City Engineer for any work requiring a Substantial Land Alteration Permit prior to the City's final approval of the Grading Plan.

4) **Stormwater Management Plan Area Charges.** Owner acknowledges that the development of the Property results in the need for storm water management due to requirements to manage the increase in the stormwater run-off rate/volume and potential degradation of surface water quality attributable to the increase of impervious area within the Project. The following specific terms and conditions shall apply to the Property for storm water obligations:

   a) The City Engineer has determined the Owner shall provide both ***onsite Storm Water Management facilities and payment of Storm Water Management Plan Area Charges in lieu of onsite construction*** for managing the increased storm water runoff from the a portion of the Property.

   b) Owner agrees to pay a Storm Water Management Plan Area Charge (SWMPAC) for the entire Property. The base rate for the SWMPAC shall be (Project Specific) per developable acre. This rate is representative of low-density residential type development with an impervious area of 25% and a Land Use Factor (LUF) of 1.00. The actual SWMPAC will be calculated by multiplying the base rate times the Land Use Factor for the Property times the number of developable acres.

      SWMPAC = $ (Project Specific) x LUF x Developable Acres. This payment is a one-time charge for the availability of connection to the regional stormwater facilities, representing the proportional fair share payment of connection to and use of existing and prospective stormwater facility capital cost obligations of the City.

   c) Owner may request the approval of the City Engineer to design and construct permanent public onsite stormwater management facility(s) in lieu of payment of all or some of the Storm Water Management Plan Area Charge (reimbursable costs/credits may include construction and/or land costs). Owner may request the approval of the City Engineer to construct permanent private on site storm water management facilities to serve non-residential development. Private ponds do not receive any credit against the SWMPAC.

All storm water management facilities shall be designed by a licensed professional engineer and approved by the City Engineer.

i) Each facility approved by the City Engineer to be designed and constructed to serve as a regional storm water management facility(s) will be a City owned and maintained storm water management facility.

(1) Approved onsite public stormwater management facilities are not eligible to receive Credits toward the Storm Water Utility Fee attributable to each parcel of the Property.

(2) The developable acres of the Property will be reduced by the area occupied by the public storm water facilities.

ii) Private facilities designed and constructed to serve non-residential development will be private and will require a Declaration and Maintenance Agreement (Exhibit B).

(1) City Engineer approved onsite private stormwater management facilities maybe eligible to receive Credits toward the monthly Storm Water Utility Fee attributable to each developed parcel of the Property that discharges stormwater to the private stormwater management facilities.

(2) The developable acres of the Property will not be reduced by the area occupied by the private storm water facilities.

d) Owner agrees to construct temporary onsite stormwater facilities including storm water quantity and/or quality ponds, discharge lines, storm sewer and manholes as may be needed to manage stormwater runoff during construction/restoration activities. The facilities shall be constructed in conformance with the City approved drainage plan, grading plan and specifications, and NPDES Stormwater Permit Standards.

e) Owner agrees to design (subject to City of Rochester approval), size, and construct onsite stormwater facilities including storm water quantity and/or quality pond(s), discharge lines, drainageways, storm sewers and manholes, as well as other necessary appurtenances in conformance with the City standards and the approved drainage plan, grading plan and specifications.

f) Owner acknowledges that the development of the entire Property may be limited due to inadequate downstream public stormwater management facilities. In the event inadequate downstream facilities exist, the Owner may select one of the following options:

i) Improve/upgrade existing public or private downstream stormwater management facilities as necessary for development of the Property at Owner's sole cost.

ii) Limit the development so as not to further damage or overload the inadequate downstream stormwater management facilities or properties.

iii) Provide temporary onsite improvements so as not to further damage or overload the inadequate downstream stormwater management facilities or properties until such time as the City Engineer determines that downstream facilities are adequate

iv) Petition the City for a public improvement project to provide the adequate public stormwater management facilities, provided the improvements to the inadequate downstream stormwater management facilities are consistent with the goals and City's Capital Improvement Program and the City's Storm Water Management Plan. If, after the acceptance by the City Council of the feasibility report on the petition,

the Council approves the project for construction, the Owner shall first execute a Contribution Agreement for the Owner's share of the project cost as identified in the feasibility report and then shall be allowed to file an application for a final plat.

g) Should the City need to construct a regional stormwater management facilities to serve the storm water discharge from the Property the City may require a portion of the total Storm Water Management Area Charges, calculated for the Property, to be paid up front at the time of the first phase of development.

h) Owner agrees to allow the City to contribute to the funding for construction of incremental stormwater facility improvements on the Property for regional stormwater management facilities provided the City notifies Owner, within 90 days of the grading plan approval for each phase of development, of City's intent to participate in the construction of the regional stormwater management facilities

i) Owner agrees to obtain the necessary permits for floodway / flood fringe modifications for the Property including those portions of the Property to be dedicated to the City. Owner as part of the floodway modifications and filling of the flood plain is providing flood storage in storm water ponds, in excess of the storm water plan requirements, to offset the loss of flood storage.

j) Owner acknowledges the City has implemented a Storm Water Utility. Owner understands that the Storm Water Utility requires a Storm Water Management Plan at the time of development of the Property

k) Drainage for the Property will be accommodated in a number of proposed stormwater ponds. Future design will provide for ponds that meet National Urban Runoff Program (NURP) standards and City of Rochester standards. A portion of runoff from the Property will be directed in the MnDOT stormwater pond to be constructed by MnDOT's contractor in the southwest quadrant of TH 63 and 40th Street. Stormwater runoff from the Property into the MnDOT ponds will be restricted to the existing (pre-development) site runoff conditions from the Property as identified in the Conditional Letter of Map revision (CLOMR) analysis prepared for MnDOT for the TH 63 / 40th Street roadway improvement project. The remainder of the stormwater runoff calculated for the proposed (post-development) site runoff conditions will be treated in a storm pond or ponds designed with the future site development and these pond(s) will discharge into Willow Creek. Detention and treatment requirements shall be defined at the time of specific site development plan(s) and associated grading plan(s) for the Property.

l) Temporary sedimentation treatment for the graded portions of the Property will be provided in the existing wet pond in the previously mined area on the north side of the Property prior to discharging site runoff into Willow Creek. A swale shall be graded along the west side of the proposed West Frontage Road to capture site runoff and convey it into the existing wet pond for sediment removal. Other erosion and sediment control measures will be implemented as illustrated on the approved Grading Plan. Erosion and sediment controls are required for each site development plan submitted for the Property.

m) Owner acknowledges that portions of the Property lie within the 100-year floodfringe and are subject to the additional standards of the "floodprone" overlay district and Shoreland District. Owner agrees that any filling of or development in the floodprone areas is subject to compliance with all applicable federal, state and local requirements and requires the issuance by the City of a separate conditional use permit.

n) Owner agrees to provide the City, within 10 days of City's written request, the opportunity to review data, reports, studies and other information in Owner's possession relating to wetland delineation, floodway / flood fringe modifications, stormwater management studies and pond design calculations, hydrological studies and soil borings on the Property as they may relate to and assist the City in its review of proposed stormwater facilities proposed to serve the Property.

o) All temporary and permanent stormwater facilities shall be designed and constructed in a manner that provides access for maintenance.

5) **Private Storm Water Management District. (PSWMD)** Owner may create a private Stormwater Management District (SWMD) to address cost sharing for regional stormwater improvements to serve the Property and other adjacent properties. Owner shall provide to the City, prior to the City's approval of the final the Grading Plan for the Property, a copy of an executed agreement with the adjoining property owner(s) outlining each parties respective cost participation in the construction and maintenance of stormwater management facilities, necessitated by future development within the private PSWMD, including the Property. In addition:

a) All adjacent property owners participating in the PSWMD shall execute a Declaration and Maintenance Agreement (Exhibit C) for storm water management facilities constructed as part of the private SWMD.

b) All stormwater management facilities proposed for the PSWMD shall be constructed in conformance to City requirements.

c) Owner may request the City Engineer accept the PSWMD facilities as public facilities and to take over ownership and maintenance for those facilities. City acceptance of the PSWMD facilities shall be based on the following criteria:

i) The dedication of the PSWMD stormwater management improvements to the City shall be after all development of the Property and adjoining property that is within the PSWMD is complete.

ii) The maintenance of the PSWMD required by the Ownership and Maintenance Agreement (Exhibit C) shall have been performed by Owner. Owner shall provide written record of the maintenance activities provided while under the PSWMD control.

iii) The land upon which the PSWMD facilities have been constructed by Owner shall be dedicated by warranty deed to the City as an Outlot, or series of connected Outlots.

iv) The PSWMD area or portions thereof shall be provided at no cost to the City; such warranty deed to be subject to any obligations of Owner pursuant to the Grading Plan and Drainage Plan. Owner shall be responsible for payment of all deed taxes as well as any current year and back taxes.

v) Owner agrees to grant, at no cost to the City, easements for access to maintain the stormwater facilities.

6) **Avigational Easement.** NA

7) **Noise Abatement.** Owner will incorporate noise abatement designs into any permanent habitable buildings to be constructed on the Property consistent with the Housing and Urban Development interior noise levels established at no more than 45 dBA for interior spaces. Owner also waives all future rights to request government provision of any noise abatement to serve the Property.

Owner agrees to dedicate a Noise/Air Space Easement (Exhibit D) for those areas proposed for residential dwellings, if any, of the Property lying within a distance of 1/4 mile of TH 63. Owner agrees to pay a document preparation and recording fee of $70.03 for the Noise/Air Space Easement if the document is executed separate from this Development Agreement.

8) **Willow Creek Transportation Improvement District(s)**. Owner acknowledges that the City of Rochester Substandard Street Policy applies to the Property. The City Council has endorsed the creation of the Willow Creek Transportation Improvement District (WCTID) and the Willow Creek Interchange(s) Transportation Improvement District (WCITID) to address cost sharing for new street construction and existing street reconstruction and roadway capacity improvements to serve this area of the City.

a) Owner acknowledges that the City Council may created a Willow Creek Transportation Improvement District (WCTID) to address cost sharing for street reconstruction/construction and capacity improvements to serve developing areas of the City in which the Property is located. Owner shall pay the adopted WCTID charges for the Property within 30 days of invoicing after City / Owner Contract approval for the Property. If the WCTID charges have not been adopted by the City Council prior to the approval of the final plat, the charges shall be based upon a current estimate of the costs for the projects needed in the area and prorated across the benefiting property in the WCTID at a rate of $0.75 / developable square foot of commercially zoned property and $0.25 / developable square foot for residentially zoned property (rate for 2004/2005).

b) Owner acknowledges that the City Council may create of a Willow Creek Interchange(s) Transportation Improvement District (WCITID). The WCITID charge will be apportioned to area properties based on the portion of the cost of the interchange that would equate to the cost of signalized expressway intersections with TH 63 at 40th Street and 48th Street that would be assessed to properties in the District, and the balance of the project cost to the City. The City will use distance / proximity increments to apportion the WCITID Charges with property closer to the interchange paying the higher charges / rates. Owner shall pay the adopted WCITID charges for the Property within 30 days of invoicing after City / Owner Contract approval for the Property. If the WCITID charges have not been adopted by the City Council prior to the approval of the final plat, the charges shall be based upon a current estimate of the costs for the projects needed in the area and prorated across the benefiting property in the WCITID.

c) If Owner receives compensation for any portion of the 40th Street SW and/or 11th Avenue SW right-of-way that would have been dedicated pursuant to City standards by Owner at the time of platting, but instead has been purchased by MnDOT for the City under provisions of the TH 63 Project Joint Powers Agreement between the City and MnDOT, then Owner agrees to reimburse the City within 30 days of invoicing by the City, those costs the City paid to MnDOT for Owner's Property needed to construct 40th Street and/or 11th Avenue SW.

The Substandard Street Capacity Charge (SSCC) component of the WCTID attributable to Owner's Property will be roughly proportional to the percentage of additional design year Peak Hour traffic generated by GDP #03-214 as compared to the total design year Peak Hour traffic within the WCTID. The baseline for calculating Owner's roughly proportional share of the SSCC will be projected use of the Property and associated trip generation information contained in the Trunk Highway 63 Traffic Technical Memorandum dated March 2001 prepared for MnDOT by Edwards and Kelcey, Inc. for the Project Consultant Yaggy Colby Associates all as part of the Trunk Highway 63 Environmental Assessment.

d) Any unpaid WCTID or WCITID charges shall be payable no later than 5 years from the date of the Development Agreement.

e) Owner agrees to pay the WCTID and WCITID Charges at the time of development of any portion of the Property subject to GDP #03-214. The Charges applicable to any request for platting shall be calculated by determining the proportionate share of non-residential or residential land in the plat as compared to the total amount of non-residential or residential land, respectively, in the WCTID and WCITID, and applying the proportionate percentage of land to either the total non-residential or residential Peak Hour trip generation estimated for the WCTID and WCITID to determine the proportionate share of the total Substandard Street Capacity Charge applicable to the development. For example, if the site being platted comprises 25% of all non-residential land in the WCTID, and the non-residential land in the Willow Creek TID generates 75% of all trips, then the proportionate share for the proposed development would be 18.75% (0.25 x 0.75) of the total estimated WCTID charges.

f) Payment is required within 30 days of invoicing after City's approval of each Site Development Plan proposed for the Property, but in no event will the City issue building permits for construction on that respective site on the Property until payment has been received.

g) WCTID and WCITID Charges shall be based upon an estimate of the City's share of the total project costs for the transportation projects, including preliminary and final design engineering, right-of-way, construction and construction engineering, needed in the area of the WCTID and WCITID proportional allocated to the benefiting properties at a rate set by the City Council

h) Owner agrees the City may adjust the estimated cost of Owner's proportional share of the WCTID and WCITID costs based on final project costs for Stage 1 and Stage 2 of the TH 63 Project. Owner acknowledges that Owner's final payment will based on the City Council's formal adoption of the Charges attributable to the Property. This final payment adjustment may require reimbursement by the City or additional payment by the Owner. The adjusted payment/reimbursement adjustment shall be made within 30 days after invoicing and written notice to Owner of the final WCTID and WCITID project costs and calculation and final approval of the Charges by the City Council

* * *

[REMAINDER OF DRAFT AGREEMENT DELETED]

Dated this ____ day of _____, _____.

IN WITNESS WHEREOF, the parties set their hands and seals as of the date and year first above written.

City of Rochester, a Minnesota

Municipal Corporation

By_____
Its Mayor

Attest:_____
Its City Clerk

To be revised. SEE FRONT OF DOCUMENT

By _____
Its President

_____

STATE OF MINNESOTA)
) SS
COUNTY OF OLMSTED)

The foregoing instrument was acknowledged before me this _____day of _____, 2003, by Ardell F. Brede and Judy Scherr, the Mayor and City Clerk, respectively, of the City of Rochester, a Minnesota municipal corporation, for and on behalf of the municipal corporation.

_____
Notary Public

STATE OF MINNESOTA)
) SS
COUNTY OF OLMSTED)

The foregoing was acknowledged before me this _____ day of _____, 2003, North American Realty personally known to me to be the persons who executed the foregoing instrument and acknowledged that they executed the same as their free act and on their own behalf.

_____

Notary Public

[EXHIBITS FROM DRAFT AGREEMENT DELETED]

Compilation of Federal Takings Decisions from 1990 - 2006

Dismissed
Abstention

Hankin Family P'ship v. Upper Merion Township

State Court: No. 99-16287, 2001 WL 34084818 (Pa. Ct. Comm.Pl. Apr 12, 2001), related proceeding 799 A.2d 938 (Pa. Cmwlth. 2002), appealed granted 572 Pa. 716, 813 A.2d 847 (Pa. 2002), order reversed 576 Pa. 115, 838 A.2d 718 (Pa. 2003) No. CIV. A 01-1622, 2002 WL 461794 (E.D. Pa. Mar 22, 2002) (NO. CIV. A. 01-1622), order vacated by sub nom. Timoney v. Upper Merion Township, 66 Fed. Appx. 403 (3rd Cir. 2003)

Landowners challenged township's longstanding refusal to rezone or otherwise allow development of land for purposes similar to surrounding parcels.

State Court 2000-2002; Federal Court 2001-2003

Bannum, Inc. v. City of Columbia

1999 U.S. App. LEXIS 20836 (4th Cir. 1999)

Construction company sued city and zoning board for denying its petition for a special exception permitting construction of a prison halfway house within the city limits.

Federal Court 1997-1999

Slyman v. City of Willoughby

1998 WL 24990 (6th Cir. 1998)

Plaintiff's plan for multi-family development complied with all applicable zoning requirements. City officials asked that plaintiff delay the proposed project in any event because the property was near an airport; plaintiff acquiesced twice. "Plaintiffs were further induced to defer their proposal by the City's representation that it would find suitable property with which to 'swap' with Plaintiffs." The promised land swap never occurred, and the City re-zoned the property to prevent the multi-family project. Sixth Circuit dismissed all federal claims and invoked Pullman abstention, on grounds that the effect of a court of common pleas order from 25 years earlier could only be interpreted by a state court.

More than four years elapse from plaintiff's application for site plan approval, to court's decision.

Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal

708 F.Supp. 1477 (W.D. Va) (summay judgement phase), 749 F.Supp. 1439 (W.D. Va. 1990) (trial phase), vacated and remanded, 945 F.2d 760 (4th Cir. 1991), on remand, 922 F.Supp. 1131 (W.D. Va. 1996), rev'd and remanded, 135 F.3d 275 (4th Cir. 1998)

In 1990, the U.S. district court found that a taking occurred. After the federal trial court awarded compensation to plaintiff for a taking, the Fourth Circuit decides that district court should have exercised Burford abstention, because remedies were presumably available under state law. Plaintiff then pursued state remedies. After state proceedings were completed, plaintiff went back to the U.S. district court, which reinstated its finding seven years earlier that a taking had occurred. On second appeal, the 4th Circuit acknowledges that "[t]his case has already passed through procedural purgatory and wended its way to procedural hell." 135 F.3d at 284. The 4th Circuit nonetheless remanded back to district court "for whatever proceedings may remain." Id. at 290. The 4th Circuit held that, even though nine years of litigation had ensued, plaintiff should still be kept out of federal court on its takings claim. The appeals court reasoned that plaintiff should have sought to reconvene a state annexation court that had been out of existence for over ten years which, in any event, was powerless to award the monetary relief plaintiff sought through its takings claim. In any event, 4th Circuit addressed merits of claim and found no taking on the merits occurred.

About 20 years elapse between time of court order to provide sewer service to plaintiff's lot, to most recent appeals court decision.

Dismissed
Res Judicata/Collateral Estoppel

Trafalgar Corp. v. Miami County Bd.

State Court: 2001 Ohio App. LEXIS 3946 (Sept. 7, 2001); 2004 Ohio 177 (Ohio Ct. App., Miami County Jan. 16, 2004); aff'd 819 N.E.2d 1040 (2004); Federal Court: 2006 U.S. Dist. LEXIS 14574 (S.D. Ohio Mar. 11, 2006).

Plaintiffs sought to change the zone of their property from general agricultural to single-family residential. The zone change was approved by the Miami County Planning and Zoning Commission in the years 1995, 1997, 1999, 2000, 2001, 2002, 2003, and 2004. However, each time the Commission granted approval, voters defeated the changes by referendum. Plaintiffs alleged that the repeated refusals to rezone constituted a taking of their property.

1999-2006

Torromeo v. Fremont

State Court: Unreported (Rockingham, Dec. 27, 1999; (Rockingham, Jan 31, 2000; Rockingham, Mar. 19, 2001; Unreported (Sept. 26, 2001); reconsideration denied Superior Court Unreported (Oct. 15, 2001), rev'd 148 N.H. 640 (2002), cert. denied 539 U.S. 923 (2003) Federal Court: 2004 DNH 184 (2004); 438 F.3d 113 (1st Cir. 2006)

Plaintiff developers sought damages for delay in issuance of municipal development permits.

1999-2002

Saboff v. St. John's River Water Management District

State Court: Circuit Court unreported, aff'd 681 So. 2d 757 (Fla. Dist. Ct. App. 1996); Federal Court: Unreported, rev'd 200 F.3d 1356 (11th Cir. 2000), cert. denied 531 U.S. 823 (2000)

Landowners sued agency that granted permit for construction with condition of deed restriction prohibiting construction on portion of property.

1991-2000

Wilkinson v. Pitkin County Bd. of Comm'rs

142 F.3d 1319 (10th Cir. 1998)

Landowner submitted three different development applications to county commissioners, all of which were rejected. Thereafter, landowner filed two separate state court actions alleging, among other claims, inverse condemnation and taking of all reasonable economic use of property. State court eventually dismissed all claims. Subsequently, landowner filed § 1983 action to vindicate federal constitutional claims, but federal court dismisses case on res judicata and collateral estoppel grounds in light of prior state court litigation. Court ordered dismissal while "not[ing] our concern that [Williamson County's] ripeness requirement may, in actuality, almost always result in preclusion of federal claims….It is difficult to reconcile the ripeness requirement of Williamson with the laws of res judicata and collateral estoppel." 142 F.3d at 1325, n. 4.

Timing unclear from decision.

Dodd v. Hood River County

59 F.3d 852 (9th Cir. 1995), following remand, 136 F.3d 1219 (9th Cir. 1998)

Plaintiffs sought only to build a single retirement home on the 40 acres they owned. On initial appeal, plaintiffs submitted to the following five-year process to ripen their takings claim: (1) file multiple permit applications with local zoning bodies, which denied each application; (2) appeal each denial to Oregon's Land Use Board of Appeals; (3) seek review of those administrative denials in state court; and (4) seek state court appellate review of the state trial court decisions. However, even after exhausting their takings remedies through inverse condemnation in state court, federal courts refused to hear the merits of the as-applied takings claim and dismissed the case on collateral estoppel grounds.

Eight years elapse from initial submission of development plans to build retirement home, to 9th Circuit's second opinion.

Treister v. City of Miami

893 F.Supp. 1057 (S.D. Fla. 1992)

Owner sued in state court challenging city's refusal to rezone property. After removal, owner amended complaint to include § 1983 claim, which was stayed pending resolution of state law claims in state court. State granted summary judgment to city, which then moved for dismissal of federal action on ripeness grounds. The district court found the Williamson test satisfied. Owners had made numerous zoning applications to determine the extent of permissible zoning, and had thus satisfied the finality prong. At the time of the alleged taking, no monetary compensation was available in the state courts, so there was no state remedy to exhaust. In any event, federal court invokes res judicata to dismiss takings claim.

Litigation alone, in federal and state courts, spanned at least six years.

Dismissed
Rooker-Feldman

Anderson v. Charter Twp. of Ypsilanti

71 F.Supp.2d 730 (E.D. Mich. 1999), aff'd 266 F.3d 487 (6th Cir. 2001)

Landowner sued township claiming that the denial of his application to rezone his property resulted in a taking without just compensation.

State Court 1988-1994; Federal Court 1994-2001

Zealy v. City of Waukesha

State Court: 194 Wis. 2d 701, 534 N.W.2d 917, 1995 Wisc. App. LEXIS 643 (Wis. Ct. App. 1995), review granted 540 N.W.2d 200 (Wis. 1995), reversed 201 Wis. 2d 365, 548 N.W.2d 528, 1996 Wisc. LEXIS 63, 42 Env't Rep. Cas. (BNA) 2179 (Wis. 1996); Federal Court: 153 F.Supp.2d 970; 2001 U.S. Dist. LEXIS 12102 (E.D. Wis. 2001)

Plaintiff developer granted an easement to the City after being told that the property could be developed for residential purposes if the easement was granted. The City then rezoned a portion of Plaintiff's property as a conservancy.

1990 - April 2001

Dismissed
WC Both Prongs

R-Goshen, LLC v. Village of Goshen, et al.

Federal Court: 289 F.Supp.2d 441 (S.D.N.Y. 2003), aff'd in unpublished decision 115 Fed. Appx. 465 (2d Cir. 2004)

Plaintiff corporation sued defendant village, planning board and architectural consultant after application to construct retail pharmacy was denied.

October 29, 2003 - October 6, 2004

The Seventh Regiment Fund v. Pataki

179 F.Supp.2d 356 (S.D.N.Y. 2002)

Plaintiffs had an interest in a state armory pursuant to a lease agreement with the state. Defendants issued requests for proposals to develop the armory. Plaintiffs sued state officials and proposed developers for interfering with their property rights.

Timing unknown

RKO Delaware, Inc. v. City of New York

Federal Court: Unreported, 2001 WL 1329060 (E.D.N.Y. 2001)

Theatre owner challenged NYC Landmarks Preservation Commission over failure of Commission to issue renovation permits for 128,000 square foot building where landmark occupied 2,000 square foot lobby.

Federal Court May 5, 2000 - August 30, 2001

Stutchin v. Town of Huntington

71 F.Supp.2d 76 (E.D.N.Y. 1999)

Property owners brought suit against town because the town denied their permit to build a 115 foot dock behind their property.

May 1998 - September 1999

Pond Brook Development, Inc. v. Twinsburg Township

35 F.Supp.2d 1025 (N.D. Ohio 1999)

Property owner sued township that amended zoning maps to reclassify its property.

Timing unknown

Dakota Ridge Joint Venture v. City of Boulder

1998 WL 704694 (10th Cir. 1998)

Property owner's allegation of regulatory taking dismissed because all state inverse condemnation remedies had not been pursued.

Timing unclear from opinion.

Forseth v. Village of Sussex

1998 WL 681469 (E.D. Wisc. 1998)

Plaintiff submitted at least three preliminary plats for approval by local officials. Eventually all county and state authorities approved the final plat except the Village Board. Tews, a neighboring landowner, objected to the plan throughout the application process. Subsequently, Tews was elected as President of the Village Board. In his capacity as President, Tews "engaged in a series of actions to prevent and obstruct the [project]" and "insist[ed] upon modifications and concessions" for his own personal benefit. 1998 WL 681469 at *11. For example, the Village Board (with Tews as President) agreed to the final plat only on the condition that Plaintiff conveyed to Tews about 2 acres of land on the border between Tews's and Plaintiff's property. Plaintiff reluctantly acquiesced; the 2-acre buffer was valued at $55,000, and Tews offered $1,500 but then agreed to pay $6,000. In dismissing case on finality ripeness grounds, court stated: "Is it that [property owners] have omitted the steps necessary to obtain review in state court and hope for the best in a second-chance forum? Well, we are not cooperating. Litigants who neglect or disdain their state remedies are out of court, period." 1998 WL 681469 at *5 (citing River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (procedural due process zoning case; no takings claim raised)). Forseth court recognized that "this interpretation of Williamson goes too far" but it is nonetheless "binding" in the 7th Circuit.

Six years from initial request of preliminary plat approval, to court's decision.

Hallco Environmental, Inc. v. Comancher County Bd. of Comm'rs

1998 WL 339460 (10th Cir. 1998)

Property owner initially pursued state court litigation challenging constitutionality of moratorium up to state supreme court level. Applicant incurred a nonrefundable landfill application fee of $90,000 in navigating the permit process. Ultimately, no federal court reached the merits of any of plaintiff's constitutional claims; due process, equal protection, and other constitutional claims were "subsumed" within the takings claim and all dismissed as unripe.

Eight years elapse from application to construct a landfill, the appeals court's decision.

Hallco Texas, Inc. v. McMullen County

934 F.Supp. 238 (S.D. Tex. 1996)

Plaintiff received permit from environmental commission to develop a solid waste disposal facility. After receipt of this approval, county commissioners adopted an ordinance to specifically prohibit the proposed development.

Four years elapse from submission of initial development application, to court decision.

Bateman v. City of West Bountiful

89 F.3d 704 (10th Cir. 1996)

With full knowledge of and inspection by city officials, plaintiff constructed his residence. Twelve years later, city determined the property did not comply with side yard and set back requirements, thus rendering the property unsaleable and unmortgageable. Takings claim was found not ripe because Certificate of Noncompliance "left open the possibility" that Plaintiff could obtain a variance, even though he had been told his project was out of compliance.

Twelve years elapse from point plaintiff completed construction of residence, to city's determination that building did not comply with the zoning ordinance.

Specialty Malls of Tampa v. City of Tampa

916 F.Supp. 1222 (M.D. Fla. 1996)

Property owners challenged denial of special use permit to operate exotic dance club.

At least six years elapse between plaintiff's request to city to interpret zoning ordinance, to court decision.

Emory v. Twiggs County

883 F.Supp. 1546 (M.D. Ga. 1995)

In zoning letter, county initially responded that the property was not subject to any official land use plan. Subsequently, zoning was adopted to apply to the plot in question; a moratorium was imposed by resolution to prevent landfill uses proposed by plaintiff; and the county adopted another resolution to close a road to plaintiff's property leaving the land without public access. Despite the moratorium, court believed plaintiff should have applied for a variance or lobbied to legislatively amend the resolution. With regard to the road closing, the court found "no affirmative act" by the county to close the road—even though the road had actually been closed for at least a year prior to the court's decision.

Four years elapse from plaintiff's request for a "zoning letter" from county officials, to court decision.

Herrington v. City of Pearl

908 F.Supp. 418 (S.D. Miss. 1995)

Despite the fact that plaintiff alleged violations of several constitutional rights, "the City's regulation of land use within its boundaries….should seldom be the concern of a federal court."

Six years elapse from first attempts to obtain permits, to court decision.

Quality Refrigerated Services, Inc.

908 F.Supp. 1471 (N.D. Iowa 1995)

City officials specifically contacted plaintiff to locate his business in the area. Plaintiff entered into a development agreement with the city to renovate the facility. City adopted a resolution to expedite Plaintiff's ability to lease a portion of the facility. City re-zoned the property from industrial to commercial, but encouraged the leasing transaction so plaintiff thus entered into a 10-year lease with tenant. Plaintiff applied for a building permit to remodel the building, but the city denied the application in light of the re-zoning. Plaintiff then filed an action to re-zone the property back to industrial, the planning commission approved the re-zoning, but the city council denied the re-zoning. Court nevertheless found takings claim unripe despite city's efforts to attract the use in question.

Six years elapse from date that city entered into development agreement with plaintiff, to court decision.

Glendon Energy Co. v. Borough of Glendon

836 F.Supp. 1109 (E.D. Pa. 1993)

No final decision because developer failed to appeal a rezoning, that was adopted in a behind-closed-doors session of the local legislature specifically to prevent the project at issue.

Six years elapse from submission of first plan, to court's decision.

W. Birkenfeld Trust v. Bailey

827 F.Supp. 651 (E.D. Wash. 1993)

Landowners challenged management plan for Columbia River Gorge National Scenic Area. Court dismissed takings claim for failure to pursue all state remedies.

Timing unknown

Villas of Lake Jackson, Ltd. v. Leon Country

796 F.Supp. 1477 (1992), further proceedings, 884 F.Supp. 1544 (1995), on rehearing, 906 F.Supp. 1509 (N.D. Fla. 1995), aff'd, 121 F.3d 610 (11th Cir. 1997)

Plaintiff seeks to build multifamily apartment complex. After plaintiffs submitted initial application, county enacts moratorium that prohibits approximately 95% of the proposed development plan. Subsequently, an ordinance is passed to keep the moratorium in place indefinitely. Plaintiffs thereafter submit another proposal, but county refuses to issue a permit because of the use restrictions under the ordinance. Plaintiffs then submit another plan to develop adjacent areas outside of the moratorium lands. County issues building permit for these areas, but then re-zones property and revokes them. Nonetheless, court finds no final decision because plaintiff failed to submit yet another proposal after the rezoning.

Four years elapse from submission of first development application, to court's initial decision on the takings claim. Six more years of litigation on other constitutional counts.

Seguin v. City of Sterling Heights

968 F.2d 584 (6th Cir. 1992)

City installed sewers and water lines to service the proposed development and charged plaintiffs for the installation of these facilities. Plaintiffs then entered into contracts to sell the parcels, but the city re-zoned the property to prohibit the commercial development even though it already provided the public facilities for the project.

Three years elapse from re-zoning, to court's decision.

Executive 100, Inc. v. Martin County

922 F.2d 1536 (11th Cir. 1991)

Property owners brought suit because of county's denial of a request for zoning change.

Four years elapse from application for rezoning, to court's decision.

Southview Associates, Ltd. v. Individual Members of the Vermont Environmental Board

782 F.Supp. 279 (D. Vt. 1991)

State officials openly declared they would oppose the development plan. Nonetheless, no final decision for takings purposes because developer did not submit alternative proposals. Court does not indicate how many other applications would be needed to ripen the takings claim.

Six years elapse from submission of first development application to court's decision.

Milne v. Township of Oregon

777 F.Supp. 536 (E.D. Mich. 1991)

Appeal from denial of variance request was ripeness prerequisite to takings claim in federal court, even though owner received notice of violation threatening criminal prosecution. Court concludes this is simply a "run-of-the-mill" zoning dispute.

Timing unknown

Southern Pacific Transportation v. City of Los Angeles

922 F.2d 498 (9th Cir. 1990)

Property owners challenged zoning ordinance that limited abandoned railroad rights of way to surface parking. Court held takings claim not ripe absent showing that state procedures had been exhausted.

Five years elapsed from rezoning to court's decision

Martinez v. Junta de Planificacion de Puerto Rico

736 F.Supp. 413 (D.P.R. 1990)

Zoning rendered property unsaleable and unmortgageable. Nonetheless, court finds takings claim unripe, even though landowners opposed the zoning regulations at public hearings, and even though Puerto Rico condemnation statutes did not expressly permit damages for temporary taking.

14 years elapse from zoning classification rendering plot off-limits to development, to court's decision.

Dismissed
WC Prong 1 (No Final Decision)

Hanna v. City of Chicago

212 F.Supp.2d 856 (2002), 65 Fed. Appx. 565 (2003)

Property owner sues City for City's adoption of height limitations on certain residential properties.

1-2 years (ordinance enacted in 2000, and first trial held in 2001)

Currier Builders, Inc. v. Town of York

Federal Court: 2002 U.S. Dist. LEXIS 9942 (D. Me. May 30, 2002), aff'd in part 2002 U.S. Dist. LEXIS 12494 (D. Me. July 8, 2002) (reviewing magistrate judge's earlier decision and holding that plaintiff could not invoke futility exception in takings claim)

Developers sued town on an ordinance that, inter alia, limited the number of dwelling units authorized per month and prohibited persons from submitting more than one residential building permit application per month for lots not within a subdivision.

Federal Court approximately May 30, 2002 - July 8, 2002

Dougherty v. Town of North Hempstead Board of Zoning Appeals

Federal Court: 282 F.3d 83 (2d Cir 2002)

Landowner sued zoning board of appeals when he was denied a permit to add to a nonconforming dwelling.

Federal Court 1999-2002

Kittay v. Giuliani

U.S.D.C. for the Southern District of New York, 2001 U.S. App. LEXIS 11985; aff'd 252 F.3d 645 (2d Cir. 2001)

Claimant brought action claiming that water regulations promulgated by the State of New York were so expensive to comply with that they hindered residential and commercial development.

Federal Court 1999-2001

Goldfine v. Kelly

80 F.Supp.2d 153 (S.D.N.Y. 2000)

Landowner sued city, several Department of Environmental Protection employees, and a member of a civic association because of their hostility towards and delay in approving the landowner's residential subdivision.

Timing not clear

Garamella v. City of Bridgeport

Federal Court: 63 F.Supp.2d 198 (D. Conn. 1999)

Property owners challenged the City's designation of their property as within a runway protection zone.

Timing not clear

Hidden Oaks Limited v. The City of Austin

Federal Court: 138 F.3d 1036 (5th Cir. 1998), 1998 U.S. App. LEXIS 13675 (5th Cir. 1998)

Apartment owners sued the City when, in the course of negotiations on bringing the complex up to compliance with the housing code, the City placed a two year utility hold on their buildings.

Federal Court 1995-1998

Cedarwood Land Planning v. Town of Schodack

State Court: removed to Federal Court by defendants; State Court action unreported (brought Dec. 1, 1995 in New York State Supreme Court in Rensselaer County) Federal Court: 954 F. Supp. 513, (N.D.N.Y 1997), aff'd 1998 U.S. App. LEXIS 22157 (2d Cir. Aug. 24, 1998)

Land developer sued town, its planning board, and the town board after they passed a new zoning law that rescinded a previously-available "density bonus provision" that would have permitted plaintiff to build residential lots below the square footage requirement if he connected to acceptable central sewer and water systems.

State Court 12/1/95-12/22/95 (removed to federal court); Federal court December 1995 - August 1998

The Landing at Macadam LLC v. Hales

152 F.3d 926 (9th Cir. 1998), 1998 U.S. App. Lexis 16949)

Landowner sued when Design Commission denied a request for design review approval.

Federal Court 1996-1998

Vorhees v. Brown, et al.

Federal Court: Unpublished, 1996 U.S. Dist. LEXIS 3637 (N.D. Ill. 1996), aff'd in unpublished decision 1998 U.S. App. LEXIS 1728 (7th Cir. 1998), cert. denied 525 U.S. 824 (1998)

Plaintiff landowner sued members of the Illinois Department of Transportation, County, two cities and Aero Club, claiming that a statute that precluded plaintiff from "creating or constructing an airport hazard which obstructs a restricted landing area or residential airport" on his land, constituted a taking.

Federal Court 1995-1998

Virgin Islands Conservation Society, Inc.

857 F.Supp. 1112 (D. V.I. 1994)

After eight years of navigating the zoning process, fighting community opposition, and litigating, “the court [was] back to the same point as in 1989—poised to review the granting of the permits.” Although land use agencies granted permits for the proposed development, the takings claim was found not ripe. Remanded for more proceedings and environmental reviews.

Eight years elapse from first permit applications, to court decision.

Restigouche, Inc. v. Town of Jupiter

845 F.Supp. 1540 (S.D. Fla. 1993)

Plot downzoned to prevent a previous use, approved by town staff and earlier permitted under special exception.

Four years elapse from submission of initial development application, to court's decision.

Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs of El Paso County

972 F.2d 309 (10th Cir. 1992)

Although plaintiff was granted a mining permit in 1988, and began mining the property, agency decided that a predecessor to plaintiff abandoned its permit in 1974, thus requiring plaintiff to commence the permit process anew under current and more strict regulations.

Owners and predecessors had unsuccessfully applied for mining permits for 19 years until court's decision.

Medina Corp. v. City of Charleston

959 F.2d 231 (4th Cir. 1992)

After property was re-zoned specifically to halt the development at issue, plaintiff filed suit in state court for a taking. The city (apparently) then removed the action to federal court.

Six years elapse from rezoning of plaintiff's land, to court's decision

Langley Land Co. v. Monroe County

738 F.Supp. 1571 (M.D. Ga. 1990)

Owner sought to enjoin county's threatened use of eminent domain power. No final decision even though county already decided plaintiff's land would be condemned.

Timing unknown

Dismissed
WC Prong 2 (Failure to Exhaust State Remedies)

J-II Enterprises, LLC v. Board of Commissioners

Federal Court: Unreported, aff'd 135 Fed. Appx. 804 (6th Cir. 2005)

Developer sued county board of commissioners after it refused to release the subject property for sanitary sewer services despite the planning commission's approval of the developer's proposed subdivision.

Timing unknown

J.D. P'ship v. Berlin Township Bd. of Trustees

State Court: No. 00CAH01002, 2000 WL 1074302 (Ohio App. Ct. Aug 02, 2000), appeal not allowed by 90 Ohio St. 3d 1484, 738 N.E.2d 1256 (Ohio 2000) Federal Court: No. 2:00-CV-787, 2005 WL 1523775 (S.D. Ohio June 28, 2005)

Property owners sued municipal officials that denied applications to rezone property from farm residential to planned residential.

State Court 1999-2002; Federal Court 2000-2005

Petoskey Investment Group, LLC v. Springvale-Bear Creek Sewage Disposal Auth.

Federal Court: No. 1:03-CV-378, 2005 WL 2899451 (W.D. Mich. Nov 02, 2005)

Developer sued authority that refused to allow developer to connect to authority's sewer system.

Federal Court 2003-2005

Mikeska v. City of Galveston

Federal Court: 328 F.Supp.2d 671 (S.D. Tex. 2004); vacated and remanded 419 F.3d 431 (5th Cir. Tex. 2005) (note: the portion of the district court decision that concerned the dismissal of the takings claim was not appealed)

Plaintiff property owners of beachfront property brought § 1983 action against defendant city alleging taking after city disconnected plaintiff homes from town services because homes were deemed beyond vegetation line after tropical storm and therefore in violation of state Open Beaches Act.

3 years (January 2002-January 2005)

Gabhart v. City of Newport

State Court: 19 S.W.3d 789 (Ct. App. Tenn. 1999) Federal Court: 208 F.3d 213 (6th Cir. 2000), 17 Fed. Appx. 268 (6th Cir. 2001), 2005 U.S. App. LEXIS 26290 (6th Cir. 2005)

Landowner who was subdividing property sued to enjoin the City from enforcing its regulations, which would have required the plaintiff to pave the gravel road running across the property. District Court characterized federal action as a takings claim.

November 30, 1999 - November 29, 2005

Fourth Quarter Properties IV, Inc. v. The City of Concord

2004 U.S. Dist. LEXIS 1534 (M.D. N. C. 2004), aff'd 2005 U.S. App. LEXIS 6148 (4th Cir. 2005).

Landowners purchased property south of an airport with the intention of constructing a shopping center. The plaintiffs sued after the City redesignated a portion of the property as a runway protection zone, which prevented plaintiffs from building in this area.

January 22, 2004 - April 13, 2005

Reeves v. St. Mary's County

268 F.Supp.2d 576 (D. Md. 2003), 113 Fed. Appx. 551 (2004) (remanded), 2005 U.S. App. Lexis 8386 (4th Cir. Md. 2005) (affirmed)

Plaintiff developer who wanted to construct an Alzheimer's facility on her property sued agency for denying a conditional use permit.

2 suits filed in federal court. One: July 2001; Two July 2002; Final appellate decisions on claim 2 in 2005

Mackenzie v. City of San Marcos

U.S.D.C. for the Western District of Texas, San Antonio Division, 2005 U.S. Dist. LEXIS 3199

Developer sued alleging that the city violated the takings clause when it refused to "untable" a zoning request to allow the construction of multi-family housing on developer's property.

State Court 1987-1994; Federal Court 2003-2005

Flores v. Village of Bensenville

2001 U.S. Dist. LEXIS 13953 (N.D. Ill. 2001); 2003 U.S. Dist. LEXIS 4693 (N.D. Ill. 2003); 2005 U.S. App. LEXIS 23442 (7th Cir. 2005)

Landowners sued village for denying them a permit to rebuild a fire-damaged house.

August 28, 2001 - October 28, 2005

SFW Arecibo Limited Partnership S.E. v. Rodriguez

2004 U.S. Dist. Lexis 28411 (D.P.R. 2004); 415 F.3d 135 (1st Cir.), cert. den. 126 S.Ct. 829 (2005)

Developer sued agency that revoked a land use permit that it previously issued. Developer alleged that the revocation constituted a taking.

2003-2005

North Pacifica, LLC v. City of Pacifica

State Court: Unreported; Federal Court: 234 F.Supp.2d 1053 (N.D. Ca. 2002), 2005 U.S. Dist LEXIS 11442 (N.D. Ca. May 4, 2005); Subsequent history: 366 F.Supp.2d 927 (N.D. Cal. 2005) (denying MTD plaintiff's EP claim), 2005 U.S. Dist. LEXIS 11442 (N.D. Cal. 2005) (after trial on EP claim, court found city liable and awarded damages)

Property owner brought substantive due process claim against city for lengthy delays in processing its application for the construction of residential units, and equal protection claim against city for imposing onerous conditional approval on its development project.

2001-2005

Sudarsky v. The City of New York

2000 U.S. Dist. Lexis 15545 (S.D.N.Y. Oct. 24, 2000) (Jones, J.); 779 F. Supp. 287 (S.D.N.Y. 1991) (dismissing due process claims and equal protection claims); State proceeding: 247 A.D.2d 206 (1st Dept.) (state law claims dismissed), 1990 U.S. Dist. Lexis 16045 (S.D.N.Y. 1990), 969 F.2d 1041 (2nd Cir. 1992); 506 U.S. 1084 (1993), 507 U.S. 980 (1993), 1992 U.S. Dist. Lexis 16557 (S.D.N.Y. 1992), 1993 U.S. Dist. Lexis 53 (S.D.N.Y. 1993), 220 A.D.2d 353 (N.Y.App.Div. 1st Dept. 1995), 247 A.D.2d 206 (N.Y. App. Div. 1st Dept. 1998) (dismissed for failure to file notice with city),92 N.Y.2d845 (1998), 93 N.Y.2d1042 (1999), 92 N.Y.2d 815 (1998), 93 NY.2d 849 (1999), 528 U.S. 813 (1999), 24 Fed. Appx. 28; 2001 U.S.App. Lexis25223 (2nd Cir. 2001), 536 U.S. 918 (2002), 536 U.S. 976 (2002), 540 U.S. 1047 (2003), 540 U.S.1169 (2004)

Developer sued city alleging that the downzoning of his property constituted a taking without just compensation.

Timing unknown

Buckles v. Columbus Municipal Airport Authority

Federal Court: 2002 U.S. Dist. LEXIS 26264 (S.D. Ohio, Jan. 14, 2002), aff'd 90 Fed. Appx. 927 (6th Cir. 2004) [State Court: unreported (but it was appropriation action brought by airport authority, not takings claim)]

Landowner sued municipal airport authority claiming that defendant's conduct going back to at least 1995 constituted an ongoing effort to deprive him of all reasonable economic uses of a 122 acre tract land that he owned near the airport.

State Court October 1998 (appropriation action instituted by airport authority) - 1999?; Federal Court August 2000 (landowner commenced action) - March 2004

Dickinson Leisure Industries, Inc. v. City of Dickinson

Federal Court: 329 F.Supp.2d 835 (2004) (S.D. Texas)

Land at issue was not zoned until 2001, at which time the plaintiff's country club was zoned in a residential district, making plaintiff's planned improvements to the site impossible.

June 2002 - February 2004

Don Jones v. City of McMinnville

2004 WL 848188 (D.Or. 2004)

Plaintiffs sued City for refusing their request to (1) annex their property; and (2) extend public services to their property, both of which limited plaintiffs' ability to develop their land.

State Court 2004; Federal Court 2004

Global ADR, Inc. v. City of Hammond

2003 WL 22533645 (E.D.La. 2004)

Landowner owner successfully obtained conditional use permit to construct a law office on its property, but the permit was invalidated in a lawsuit brought by neighbors due to the City's failure to follow proper procedure in issuing the permit. Landowner sued City for damages.

Federal Court 2003-2004

Jones v. City of McMinnville

State Court: Removed Federal Court: 2004 U.S. Dist. LEXIS 7250 (D. Or. 2004)

Property owners filed suit in state court alleging that the denial of their application to extend public facilities and services to their property by the City constituted a taking. The City removed the case to federal court and the plaintiffs moved to have the case remanded because their takings claim was not ripe.

State Court 2004; Federal Court 2004

Henry v. Jefferson County Planning Comm'n

State Court: 201 W. Va. 289 (1997) Federal Court: 215 F.3d 1318; 2000 U.S. App. LEXIS 12844 (4th Cir. 2000), 148 F.Supp.2d 698 (N.D. W. Va. 2001), 34 Fed. Appx. 92 (2002), cert. denied 538 U.S. 944 (2003)

Plaintiff filed suit after the county denied his conditional use permit to construct townhouse development.

State Court 1995-2000; Federal court 1996-2003

M.D. Hodges Enterprises, Inc. v. Fulton County, Georgia, et al.

U.S.D.C. for the Northern District of Georgia, Atlanta Division, 2003 U.S. Dist. LEXIS 25889

Corporation sued county and others alleging that its constitutional rights were violated when the defendants failed to rezone the subject property.

State Court 2000-2001; Federal Court 2002-2003

Sandy Creek Investors, Ltd. v. City of Jonestown

Federal District Court, unreported, vacated and remanded 325 F.3d 623 (5th Cir. 2003)

Property owner sued city that refused to approve land development permit.

1999-2003

Hazen v. Anne Arundel Cty.

Federal Court: No. CIV. L-01-703, 2003 WL 504864 (D. Md. Feb 13, 2003)

Landowner sued county after it denied applications to build home on unimproved lot.

Federal Court 2001-2003

Ramey v. City of Chicago

2003 U.S. Dist. Lexis. 8451 (N.D. Ill. 2003)

Plaintiff sued city after city agencies erroneously prepared zoning maps that reflected that plaintiff's property had been downzoned.

Timing unknown

Tanners Creek Properties, LLC v. Tremain

Federal Court: 2003 WL 22284569 (S.D. Ind.)

Developers constructing residential and retail units sued City for failing to provide adequate sewers and electricity to property.

Federal Court 2002-2003

Kottschade v. City of Rochester

2002 U.S. Dist. LEXIS 1119 (D. Minn., Jan. 22, 2002); 319 F.3d 1038; 2003 U.S. App. LEXIS 2645, rehearing denied 2003 U.S. App. LEXIS 5515 (8th Cir. Mar. 21, 2003), cert denied 540 U.S. 825 (2003)

Developer claimed that city had taken his property without compensation because nine conditions imposed with grant of permit made the development an economic impossibility.

Federal Court 2001-2003

Lindquist v. Buckingham Township

Federal Court: U.S.D.C. for the Eastern District of Pennsylvania (D.C. Civil Action No. 01-CV-0236), 2003 U.S. App. LEXIS 11351

Landowners sued a township, its governing board, and several officials for alleged violations of the landowners' substantive due process rights and for an alleged regulatory taking of their property by the township.

Federal Court 1998-2003

Tri-Corp Mgmt Co. v. Praznik, et al.

Federal Court: Unreported, aff'd in part, rev'd in part and remanded in unpublished decision 33 Fed. Appx 742 (6th Cir. 2002)

Plaintiff developer sued city after city issued a stop work order that prevented plaintiff from completing its residential construction plans.

Commencement date unclear (1998 or 1999); appeal decided in 2002

Calixto Deniz Marquez v. Municipality of Guaynabo

Federal Court: 140 F.Supp.2d 135 (D.P.R. 2001); aff'd 285 F.3d 142 (1st Cir. 2002)

Landowner, who was trying to sell two parcels of land, entered into a purchase contract with two buyers. The buyers withdrew their offers after municipal officials falsely told them that the municipality intended to expropriate the parcels. One of the parcels contained an office building, and when the tenants learned of the expropriation, they vacated the premises. Landowner sued, claiming damages in the form of lost rent.

2001-2002

Purze v. Village of Winthrop Harbor

2000 U.S. Dist. LEXIS 17160 (N.D. Ill. 2000), aff'd 286 F.3d 452 (7th Cir. 2002), rehearing denied 2002 U.S. App. LEXIS 10268 (7th Cir. Ill. May 29, 2002)

Land owners sued village for refusing to allow variance from zoning code or subdivision code.

1999-2002

Anderson v. Chamberlain

134 F.Supp.2d 156 (D. Mass. 2001)

Landowner sued town for denying his application to install an underground sewage disposal system on his property.

State Court 1998; Federal Court 1998-2001

Boczar v. Kingen

Federal Court: 1999 U.S. Dist. LEXIS 22079 (S.D. Ind. 1999), claim dismissed 1999 U.S. Dist. LEXIS 22080 (S.D. Ind. 1999), judgment entered 2000 U.S. Dist. LEXIS 11615 (S.D. Ind. 2000), aff'd 2001 U.S. App. LEXIS 8833 (7th Cir. 2001)

Landowners sued City of Philadelphia alleging that the City's issuance of a stop-work order and revocation of a construction permit for renovations on their home constituted a taking.

Federal Court 1999-2001

GBT Partnership v. City of Fargo

2001 U.S. Dist. LEXIS 20195 (D. N.D. 2001)

Landowner sued the city when city planner recommended that the landowner address some concerns before he submitted his plat application. The landowner felt that addressing these concerns was too costly, and thus withdrew his application.

Timing not clear

Choate's Air Conditioning & Heating, Inc v. Light, Gas and Water Div. of the City of Memphis

Federal Court: U.S. Dist. Court (W.D. Tenn.), unreported, aff'd 16 Fed. Appx. 323 (6th Cir. 2001)

Plaintiff sued defendant when it allowed telecommunications companies to install, maintain, and operate telecommunications equipment on an easement owned by plaintiff for the purpose of constructing and maintaining an elevated water tank.

Federal Court July 19, 1999 - June 22, 2001

Cowell v. Palmer Twshp.

Federal Court: Unreported, aff'd 263 F.3d 286 (3d Cir. 2001)

Developers of commercial properties sued township after it placed liens on property being developed for an anticipated failure to make municipal improvements to the site.

Federal Court June 25, 1999 - August 27, 2001

Envision Realty, LLC v. Henderson

Federal Court: 2001 U.S. Dist. LEXIS 19651 (Nov. 28, 2001) (D. Meline)

Property owners who applied to subdivide a parcel of land sued the town and its agents for first enacting a moratorium targeting their proposed use, and then enacting regulations to prevent any future development of the property.

Approximately 6 months

Greenspring Racquet Club, Inc. v. Baltimore County

70 F.Supp.2d 598 (D. Md. 1999), aff'd in part, vacated in part 232 F.3d 887 (4th Cir. 2000), cert. denied 532 U.S. 957 (2001)

Property owners sought an exemption from the public approval process required by the Baltimore County development regulations for their plans to construct two office buildings. The Baltimore County Development Review Committee denied the exemption request and the property owners sued raising facial and as-applied takings claims.

State Court 1998-1999; Federal court 1999-2001

Cestero v. Rosa

198 F.Supp.2d 73 (D.P.R. 2002), 996 F. Supp. 133 (D.P.R. 1998), 172 F.3d 102 (1st Cir. 1999), 167 F.Supp.2d 173 (D.P.R. 2001), 204 F.R.D. 31 (D.P.R. 2001) State court proceedings: Municipio de Loiza v. Succesion Suarez, No. CIV. CC-1999-0833, 2001 WL 669629 (P.R., Jun. 11, 2001) (ordering developers to stop the removal of sand)

Developers, who had legally obtained permits to remove sand as part of a residential development project, sued after the municipality physically interfered with construction and brought an action to enjoin the developers from removing sand. (The municipality was ultimately successful in enjoining the sand removal).

Federal claim August 1997 - 2002

Bryan v. City of Madison (companion U.S. District Court case to 213 F.3d 267 (5th Cir. 2000))

Federal Court: 130 F.Supp.2d 798 (S.D. Miss. 1999), aff'd 213 F.3d 267 (5th Cir. 2000), cert. denied 2001 U.S. LEXIS 1127

Developer applied for building permit to construct an apartment complex; sued City, mayor, and two aldermen after repeated denials of his site plan made him unable to purchase the property before the contract expiration period so that he could build apartments on it.

Federal Court 1996-2001

Vigilante v. Village of Wilmette

State Court: Plaintiff sued in state court but was removed to federal court by defendant; Federal Court: 88 F.Supp.2d 888 (N.D. Ill. 2000)

Plaintiff individual sued village for violation of the takings clause based upon denial of a zoning variance.

State claim filed in approximately 1999; federal district court decision rendered 2000

The John Corporation v. City of Houston

State Court: Unreported, appeal dismissed 1998 Tex. App. LEXIS 3043 (Ct. App. Texas 1998); Federal Court: Unreported, aff'd in part 214 F.3d 573 (5th Cir. 2000)

City refused to issue permits to allow developer to renovate building.

May 29, 1998 - June 12, 2000

Geddes v. County of Cane

121 F.Supp.2d 662 (N.D. Ill. 2000)

Landowners sued the director of the county development department when he denied their request for rezoning and subsequently approved rezoning upon condition that landowners dedicate portion of their land as a right of way.

Timing not clear

Simi Investment Company, Inc. v. Harris County, Texas

256 F.3d 323 (5th Cir. 2001), 236 F.3d 240 (5th Cir. 2000), H-96-CV-1603 (S.D. Tex.) (Hughes, J.)

Property owner sued after County denied its request for driveway access to the street adjacent to its property. The County claimed to own a sliver of land that separated the property from the street.

Timing unknown

SGB Financial Servs., Inc. v. The Consolidated City of Indianapolis-Marion Cty.

Federal Court: No. IP 98-977-C-H/G, 2000 WL 680412 (S.D. Ind. Feb 07, 2000), aff'd 235 F.3d 1036 (7th Cir. 2000)

Owner of apartment complex claimed that city and county's designation of complex for condemnation was unconstitutional taking.

Federal Court 1998-2000

Myers v. Penn Township Board of Commissioners

50 F.Supp.2d 385 (M.D.Pa 1999), aff'd 242 F.3d 371 (3d Cir. 2000)

Plaintiff developer sued town commission over, inter alia, town's failure to make certain improvements related to the development, thereby denying developer the use of two of the lots.

1998-1999

McDonald's Corp. v. City of Norton

102 F.Supp.2d 431 (W.D.. Mich. 2000); No subsequent history

McDonald's challenged the city's denial of its application for a building permit.

1999-2000

Seiler v. Charter Township of Northville

53 F.Supp.2d 957 (E.D. Mich. 1999)

Plaintiff sued when the Planning Commission required him to install a public bike path and a bridge on his property as a condition of approving his subdivision application.

1997-1999

Houck v. Tate County, Mississippi

1999 WL 33537173 (N.D. Miss. 1999)

Developer sued county after it denied permit to include single-wide mobile homes in subdivision for single-family homes.

Federal Court 1998-1999

Bell v. American Fork City

State Court: D. Utah (D.C. No.97-CV-697-J) Federal Court: 201 F.3d 447, 1999 U.S. App. LEXIS 36447 (10th Cir. Utah 1999), reported in full 1999 U.S. App. LEXIS 30734, 1999 Colo. J. C.A.R. 6516, 2000 Colo. J. C.A.R. 6438 (10th Cir. Utah 1999)

Plaintiff property owner sued defendant city for failing to act on proposed site plans while condemnation proceedings were pending. The property was eventually condemned.

September 1994 - November 1999

Rau v. City of Garden Plain

76 F.Supp.2d 1173 (D. Kan. 1999)

Property owners sued city for changing zoning classifications, downsizing their property.

1998-1999

Gottlieb v. Village of Irvington

69 F.Supp.2d 553 (S.D.N.Y. 1999)

Property owner sued village and individuals for issuing stop work orders on construction in their driveway.

One year (stop order 1998 - decision 1999)

Frooks v. Town of Cortlandt

997 F.Supp. 438 (S.D.N.Y. 1998)

Property owners claimed denial of rezoning application was a taking. Claim determined to be unripe because New York has an established procedure for pursuing just compensation.

Nine years elapse between initial request for rezoning, to court's decision.

Hynes v. Charter Twp. of Waterford

1998 U.S. App. LEXIS 24987 (6th Cir. 1998)

Owners of partially developed property sued township after the township passed an ordinance limiting future development on their property and refused to grant them building permits.

Federal Court 1997-1998

Bass v. City of Dallas

1998 WL 417772 (N.D. Tex. 1998)

Property owner brought inverse condemnation claim based on city's construction that blocked access to property.

Timing unknown

Jones v. City of Pasadena

1998 WL 121668 (9th Cir. 1998)

Property owner alleged municipality had conspired to deprive him of real property without just compensation in violation of 42 U.S.C. §1983.

Timing unclear from decision.

L.C. Development Co. v. Lincoln County

996 F.Supp. 886 (E.D. Mo. 1998)

Plaintiff sought to construct a solid waste landfill, and spent more than $179,000 in preparation to make the land suitable for that purpose. In 1990, 1994, and 1996, Lincoln County voters all rejected the continuance of County zoning and planning. Nonetheless, County officials refused to cease applying the zoning ordinance to the site and insisted they would not issue any permit until plaintiff complied with zoning regulations—the very same regulations that voters rejected on three occasions. Moreover, the County amended its regulations even after citizens voted them down, to forbid the proposed land fill.

Three years elapse since request for drilling permit from state agency, to court decision.

The San Remo Hotel v. City and County of San Francisco

145 F.3d 1095 (9th Cir. 1998)

No federal claims permitted in federal court at all, where the facial takings challenge was dismissed on Pullman abstention grounds and the as-applied claim was dismissed on ripeness grounds.

More than eight years elapse between property owner's application to convert hotel to tourist use, to court's decision.

Sag Harbor Port Assocs. v. Village of Sag Harbor

1998 WL 603248 (E.D.N.Y.)

In 1994, plaintiff submitted an application to construct a tennis club. It previously submitted applications to build a residential housing project and a nursing home, but withdrew those applications because they "were met with vigorous opposition from community members and groups opposed to development of its land, and it eventually withdrew the applications because the Village's unfounded resistance caused the deals to falter."

Four years elapse from Plaintiff's construction permit application, to court's decision.

Henniger v. Pinellas County

7 F.Supp.2d 1334 (M.D. Fla. 1998)

Property owner sued County when County issued a "stop work" order after plaintiff received a construction permit for a pool house and subsequently began construction on it.

1 year (action was filed the same year)

Macri v. King County

110 F.3d 1496 (9th Cir. 1997)

Property owner sued because of county's denial of subdivision plat. Court found inverse condemnation claim had been properly remanded to state court.

Seven years elapse from initial submission of subdivision application, to court's decision

SK Finance SA v. La Plata County Bd. of Comm'rs

126 F.3d 1272 (10th Cir. 1997)

Property owner sued alleging county's denial of request to build sewage treatment facility resulted regulatory taking.

Six years elapse from submission of request to build sewage facility to serve subdivision, to court decision.

Deepwells Estates, Inc. v. Incorporated Village of Head of the Harbor

973 F.Supp. 338 (E.D.N.Y. 1997)

The Village was "advised" of Plaintiff's "poor financial condition." It then issued to Plaintiff an "ultimatum…to convey to the Village 4.68 acres of certain land and the small building which stood on that property, for no compensation and on the [Mayor's] terms, or [Plaintiff] could wait 'until the cows come home to get an approval on the subdivision map.' " Prior to acquiescing to the "coerced donation," Plaintiff was "harrassed by the Village and by its police department." 973 F.Supp. at 341. The Village later built its Village Hall on the land extorted from Plaintiff. Ultimately, Plaintiff agreed to a reconfigured subdivision imposed upon him by the Village, and signed a Village map to indicate his assent. Next, and without Plaintiff's consent, the Village amended this map and imposed upon Plaintiff's property a 200-foot road setback "[to] be left in its natural state in perpetuity." Id. at 342. Subsequently, the Village demanded more land from Plaintiff, and, after more harassment by the Village and its police department, he conveyed a second deed. Id. The Village then issued several certificates of occupancy for seven homes, but thereafter it "placed a moratorium on the plaintiff's property … and refused to issue any other certificates of occupancy" for 1½ years. Id. The Chairman of the Village Architecture Board attempted to require plaintiffs to make changes to homes which were "built and…occupied," motivated by "her alleged desire to increase the value of her own property, which was located less than one mile away…." Id. Court found that Village made final decisions with regard to property, but nonetheless dismissed takings claim for failure to seek compensation in New York courts.

Nine years elapse since initial request for building application, to court's decision.

Lanna Overseas Shipping, Inc. v. City of Chicago

1997 WL 587662 (N.D. Ill. 1997)

Plaintiff received commercial driveway permit for waterfront packing operation, used land lawfully in accordance with permit's terms, sought for and received a renewed permit—but City revoked permit unilaterally without providing any advance notice to Plaintiff. Court found that final decision was rendered by city, but dismissed takings claim solely on grounds that plaintiff failed to seek compensation in state court. Without discussing res judicata or collateral estoppel problem, court decided that "[o]nce the [state court] relief is denied, a plaintiff's claims are ripe for federal review, providing the federal court with subject matter jurisdiction over the inverse condemnation claims."

Five years elapse between Plaintiff's commencement of lawful and permitted land use, to city's revocation of permit, to court's decision.

Schulz v. Milne

849 F.Supp. 708 (N.D. Cal. 1994), rev'd on takings ripeness issue, 98 F.3d 1346 (9th Cir. 1996)

District court recognizes that plaintiffs spent so much money on seeking zoning approvals and litigation that they had no money left to pay for their remodeling. Each time plaintiffs submitted a remodeling plan "in compliance with applicable zoning laws," local officials nonetheless "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet." 849 F.Supp. at 709. Although the district court found the federal takings claim ripe, the Ninth Circuit reversed in an unpublished opinion.

Eight years elapse from owner's application for remodeling permits, to circuit court's decision.

Bensch v. Metropolitan Dade County

952 F.Supp. 790 (S.D. Fla. 1996)

Defendants enacted an ordinance that would have permitted only one residence for every 40 acres.

After ten years of litigation, 5th Amendment issue addressed.

Sinclair Oil Corporation v. County of Santa Barbara

96 F.3d 401 (9th Cir. 1996)

Facial takings challenges were found ripe but court invoked Pullman abstention to avoid them. As for the as-applied challenge under State law, the takings claim was found unripe despite court's acknowledgement that the zoning ordinance applied to plaintiff's land rendered its "use severely restricted and subject to severe limitations."

Not clear from decision.

Covington Court, Ltd. v. Village of Oak Brook

77 F.3d 177 (7th Cir. 1996)

Developer brought action alleging taking resulted from city board of trustee's conditioning of approval on settlement with residential lot owner over lot that had not yet been acquired.

Three years elapse between subdivision request, to court's decision.

Martin v. Jefferson County

78 F.3d 585 (6th Cir. 1996)

Over six-year period, plaintiff repeatedly applied for but was unable to obtain a building permit. Plaintiff was nonetheless required to exhaust remedies in state court, despite existence of Kentucky statute immunizing local governments from liability for failure to issue any permit.

Six years elapse from submission of first applications for building permits, to court's decision.

Bickerstaff Clay Products Co., Inc. v. Harris County

89 F.3d 1481 (11th Cir. 1996)

Applicant also filed state court case that was stayed pending outcome of federal case.

Three years elapse from obtaining mining permit, to court's decision.

Santa Fe Village Venture v. City of Albuquerque

914 F.Supp. 478 (D.N.M. 1995)

After initially filing in federal court, suit dismissed for failure to seek state remedies. Developer then sues in state court, which is dismissed. Second suit in federal court dismissed on ripeness grounds charging that developer was required to raise federal claims in state court--even though the state case was dismissed.

Five years elapse from option to purchase land, to court's decision.

2BD Limited Partnership v. County Commissioners for Queen Anne's County

896 F.Supp. 518 (D. Md. 1995), aff'd following remand 1998 WL 559711 (4th Cir. Sept. 2, 1998)

Plaintiff submitted at least three site plan applications and a permit to develop in wetlands. Plaintiff also sought needed variances. Thereafter, county commissioners enacted an ordinance to preclude the proposed development. One commissioner opposed the project out of fear that it would hurt his business at his nearby restaurant. Plaintiff thereafter sought another variance from this ordinance, which was denied. District court initially denied takings claim on grounds of failure to seek state remedies. District court also initially dismissed other constitutional claims under Burford abstention: "[A] district court should abstain under the Burford doctrine from exercising its jurisdiction in cases arising solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims." On initial appeal, 4th Circuit failed to reach merits and vacated entire district court decision, requesting reconsideration of entire case in light of abstention doctrine.

At least seven years elapse between submission of site plan, to final appeals court decision.

New Port Largo, Inc. v. Monroe County

873 F.Supp. 633 (S.D. Fla. 1994), aff'd, 95 F.3d 1084 (11th Cir. 1996)

Property owner challenged the validity of the rezoning in state court and also alleged that the County deprived its property without offering compensation in violation of the Florida constitution. State court found the re-zoning was improper but, because the county acted in good faith, did not award damages. Property owner then filed this suit seeking compensation under the Fifth Amendment. U.S. district court found the takings claim time-barred, but the appellate court reversed. On remand, district court again rejected takings claim on ripeness grounds because property owner did not exhaust state compensation remedies. Court never addressed the impact of the state court proceeding initially filed by the property owner.

Ten years elapse from state judge's determination that re-zoning was invalid, to circuit court's decision.

Hartman & Tyner, Inc. v. Charter Township of West Bloomfield

985 F.2d 560 (6th Cir. 1993)

Although plaintiff sought variances and satisfied final decision prong it still had to pursue state remedies, even though Michigan's highest court had never ruled that a monetary remedy was appropriate to compensate for a taking.

Four years elapse from plaintiff's request for re-zoning, to court's opinion.

Celentano v. City of West Haven

815 F.Supp. 561 (D. Ct. 1993)

Property at issue classified as "open space" upon which no development would be permitted. Nonetheless, court decides that property owner should have submitted a development application.

Timing unknown

Triomphe Investors v. City of Northwood

835 F.Supp. 1036 (N.D. Ohio 1993), aff'd, 49 F.3d 198 (6th Cir. 1995)

Court expressly recognizes that related litigation in state court and associated delays rendered the property owner unable to financially realize the project.

Seven Years elapse from submission of initial development application, to circuit court's decision

First Bet Joint Venture

818 F.Supp. 1409 (D. Colo. 1993)

Property owners sued due to moratorium on processing zoning permits for future development and for the operation of gaming facilities.

Timing unknown

Gamble v. Eau Claire County

5 F.3d 285 (7th Cir. 1993)

Property owner's regulatory taking claim dismissed for failure to pursue state judicial remedies.

Timing unclear from decision.

Christensen v. Yolo County Board of Supervisors

995 F.2d 161 (9th Cir. 1993)

Property owners sued challenging zoning agreement between county and city that prohibited the urban development of owner's land.

Four years elapse requesting zoning opinion from county, to court's decision.

Fitzgerald v. Utah County

963 F.2d 382 (10th Cir. 1992)

Property owners sued because of county ordinance that required restrictive covenants on subdivision property in order to waive the recordation of a plat.

Timing unknown

Anderson v. Alpine City

804 F.Supp. 269 (D. Utah 1992)

Among other delays, 18-month building moratorium prevented any consideration of development application by local officials. No final decision even though city concluded plaintiffs could only develop 2 out of 175 lots.

Five years elapse from submission of initial development application, to court's decision. Court characterizes this delay as "minimal."

Cap'n Hook Auto Parts, Inc. v. Board of Township Trustees of Liverpool Township

773 F.Supp. 71 (N.D. Ohio 1991)

Zoning caused plaintiffs to cease operating their business.

Timing unknown

Eide v. Sarasota County

908 F.2d 716 (11th Cir. 1990)

District court found constitutional claims ripe and jury awarded developer $850,000. Circuit court reversed on ripeness grounds and withdrew compensation award.

Six years elapse from County's adoption of sector plan, to court decision.

Asociacion de Pescadores de Vieques, Inc. v. Santiago

747 F.Supp 134 (D.P.R. 1990)

District court held that landowner had to pursue inverse condemntaiton remedies in Puerto Rico court before bringing an action for 5th amendment taking -- even thought "[n]o damages have ever been awared by the Puerto Rico Supreme Court in inverse condemnation actions. Nonetheless, said court is aware of the existence of an inverse condemnation remedy, and could grant it if the right case came along."

Four years elapse from the public hearings on development project to Court's decision. Applications for development presumably submitted before hearings.

Estate of Himelstein v. City of Fort Wayne

898 F.2d 573 (7th Cir. 1990)

Planning commission recommended the requested re-zoning to the city council, who voted against it in a 5-4 decision. Later, city council attempted to block code-mandated reconsideration of the re-zoning petition by ordering the city clerk to retrieve relevant documents from the local planning commission. Upon reconsideration, planning commission again recommended re-zoning, but city council "tabled the petition and took no further action on the matter." 898 F.2d at 574. The case went up to the Indiana Supreme Court, which held that the property should be re-zoned in Plaintiff's favor; the city council refused to abide by the highest court's decision in any event, by refusing to issue the requested development permits. Thereafter, plaintiffs filed a Section 1983 suit in federal court against the city council. The federal court then dismissed the matter for failing to seek compensation in state court, despite plaintiffs' success in the prior state court proceeding over the illegality of the city council's conduct. The federal courts required this result even though, at that time, the Indiana Supreme Court never decided whether a taking for inverse condemnation under Indiana law was compensable.

Nine years elapse from presentment of rezoning petition, to court's decision.

Adjudication on Merits

Windsor Jewels of Pennsylvania, Inc. v. Bristol Township

State Court: 792 A.2d 726, 2002 Pa. Commw. LEXIS 32 (Pa. Commw. Ct. 2002); Federal Court: 2002 U.S. Dist. LEXIS 12163 (E.D. Pa. Mar. 28, 2002), summary judgment granted, judgment entered 2005 U.S. Dist. LEXIS 2019 (E.D. Pa. Feb. 10, 2005)

Plaintiff land owner was granted building permit to renovate property for business use, but sued because after performing renovations, Township denied use and occupancy permit.

February 2001 - March 2002

Thornberry Noble, Ltd. v. Thornbury Township

Federal Court: 2000 U.S. Dist. LEXIS 13474 (E.D. Pa. 2000), aff'd 112 Fed. Appx. 185 (3d Cir. 2004), cert. denied 125 S.Ct. 1932 (2005)

Plaintiff developer sued township, board of supervisors and individual board members, alleging a temporary regulatory taking during the period in which the Board was considering plaintiff's zoning plan.

2000-2005

Sunrise Corporation of Myrtle Beach v. The City of Myrtle Beach

420 F.3d 322 (4th Cir. 2005)

Developers brought suit against city for denying building permit. Developers also appealed the denial of the building permit and eventually won the appeal and were issued a building permit. Defendants sold the property before being issued the permit.

Timing unknown

W.J.F. Realty Corp. v. Town of Southampton

State Court: 240 A.D.2d 657 (N.Y. App. Div. 2d Dep't 1997); rev'd 261 A.D.2d 609 (N.Y. App. Div. 1999); appeal dismissed 719 N.E.2d 928 (1999); Federal Court: 220 F.Supp.2d 140 (E.D.N.Y. 2002) (denying motion to dismiss); 351 F.Supp.2d 18 (E.D.N.Y. 2004)

Property owners sued town for placing an administrative hold on their subdivision application, and adopted a plan which imposed a permanent development moratorium on their property.

1993-2004

West Linn Corporate Park v. City of West Linn

Federal Court: Unreported, 2004 WL 1774543 (D. Or. 2004)

Developer alleged inverse condemnation, takings, retaliation, equal protection, and breach of contract in connection with conditions of approval for a corporate office park.

Timing unknown

Johnecheck v. Bay Township

Federal Court: Unreported, aff'd 119 Fed. Appx. 707 (6th Cir. 2004)

Township zoning board rejected property owner's permit application to build wind turbine generators on their land.

2001-2004

Santini v. Connecticut Hazardous Waste Management Service

State Court: 1998 WL 422166, aff'd 251 Conn. 121, 739, A.2d 680 (1999), cert. denied 530 U.S. 1225 (2000); Federal Court: District Court unreported, aff'd 342 F.3d 118 (2d Cir. 2003), cert. denied 543 U.S. 875 (2004)

Builder developer sued agency that designated his residential subdivision as finalist for location of low-level radioactive waste disposal facility.

State Court 1994-1999; Federal Court 2000-2004

Rucci v. The City of Eureka

Federal Court I : No. 4:96-CV-2425 (E.D. Mo. Oct. 20, 1997) (dismissing taking claim as unripe); State Court: No. 98CC-004139 (Cir. Ct. of St. Louis County Jan. 7, 2000) (judgment in favor of City on inverse condemnation claim); aff'd 45 S.W.3d 483 (Mo. Ct. App. 2001) Federal Court II: 231 F.Supp.2d 954 (E.D. Mo. 2002)

Developer sued the City after it denied his application to rezone property and construct a housing development.

1997-2002

JSS Realty Co., LLC v. Town of Kittery

U.S.D.C. for the District of Maine, 177 F.Supp.2d 64; 2001 U.S. Dist LEXIS 20694

Developer alleged that a zoning ordinance reduced the developable area on subject property making the project for which the property was purchased economically unfeasible.

Federal Court 2001

Van Horn v. Town of Castine

Federal Court: 167 F.Supp.2d 103 (D. Me. 2001)

Property owner sued Town, alleging that Town's denial of permit to reconstruct porch, based upon restrictions in a historic preservation ordinance, deprived him of the normal use of his property.

Federal Court 2001

Welders Mart, Inc. v. City of Greenville

Federal Court: 2000 WL 246607 (N.D. Tex.)

Owner of welding supply store that was destroyed in a fire sued when he was denied a building permit to replace his store.

Federal Court 1998-2000

John E. Long, Inc. v. Borough of Ringwood

61 F.Supp.2d 273 (D.N.J. 1998, aff'd 213 F.3d 628 (3d Cir. 2000)

Developer sued borough counsel and planning board for rejecting its application to re-zone its property so that it could establish smaller residential lots.

Federal Court 1996-2000

Brian B. Brown Constr. Co. v. St. Tammany Parish

17 F.Supp. 2d 586 (E.D. La. 1998)

Property owner sued alleging that denial of plan to develop property resulted in denial of all economically beneficial uses of the property by taking the property "out of commerce."

One-and-a-half years elapse between subdivision request, to court's decision.

Loreto Development Co. v. Village of Chardon

1998 WL 320981 (6th Cir. 1998)

Property owner sued because of denial of proposal to re-zone property to allow for a Wal-Mart store interfered with reasonable investment backed expectations.

Four and a half years elapse between property owner's variance and conditional use applications, to decision denying compensation.

Mont Belvieu Square, Ltd. v. City of Mont Belvieu

1998 WL 774139 (S.D. Tex. 1998)

Plaintiff applied to build a low- to moderate income, multifamily housing project with special government financing. City, however, issued a moratorium on all permits except for single-family residential units for wealthier customers. As a result, plaintiff lost federal financing for the project. Property owners alleged permit denial constituted a taking, and that the moratorium "was denied with the obvious and discriminatory purpose of preventing…low to moderate income housing which would induce minorities to move into the predominantly white city." In light of these events, court decided it would have been futile for plaintiffs to seek a variance, so it found the takings claim ripe. In any event, court ruled against takings claim on the merits because Plaintiff did not have a protectable property interest under state law vesting principles.

Five-and-a-half years elapse between permit application to build apartment project, to court's decision.

Marshall v. Board of County Commissioners for Johnson County

912 F.Supp. 1456 (D. Wyo. 1996)

Property owner brought action because of denial of subdivision approval destroyed all economically viable use of the property.

Four years elapse since submission of development application, to court decision.

Goss v. City of Little Rock

90 F.3d 306 (8th Cir. 1996), following remand, 151 F.3d 861 (8th Cir. 1998)

Ultimately, appeals court found a taking where county officials conditioned a rezoning by compelling a property owner to dedicate 22% of his land for a highway expansion.

Five years elapse from application for rezoning, to court's decision.

International College of Surgeons v. City of Chicago

91 F.3d 981 (7th Cir. 1996), rev'd, 522 U.S. 156 (1997), on remand, 153 F.3d 356 (7th Cir. 1998)

Litigation history dwells on jurisdictional issues. U.S. Supreme Court decided that a case containing claims that local administrative action violates federal law, as well as state law claims for on-the-record review of administrative findings, is within the federal courts' jurisdiction. On remand, 7th Circuit ruled that district court properly refused invoke either Burford or Pullman abstention. Appeals court recognized that "the doctrine of abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it…." 153 F.3d at 360 (citations omitted).

Eight years elapse since property owners apply for demolition permit, to appeals court's ultimate finding on the merits that no taking occurred.

Kruse v. Village of Chagrin Falls

74 F.3d 694 (6th Cir. 1996)

"One afternoon in June of 1986, the Kruse family of Chagrin Falls returned home to discover, to their intense amazement and dismay, that their backyard was missing. The back of their property has been laid waste, and the family's house was hanging at the edge of a precipice where their lawn, trees and other landscaping had been when they left home that morning. Agents of the Village had been busily at work that day, devastating the Kruses' yard and carting off tons of soil excavated from the property, as well as the family's trees, bushes, and other plantings…When the Kruses protested the destruction of their property, the Village authorities responded that they presumed that the Village owned the vacated street (even though it had granted a building permit to the Kruses' predecessors in title to build an extension on what had been the street, and even though the Village was aware of the Kruses' occupancy). The Village had determined to commence a little roadwork across the Kruses' backyard but had not given the owners any notice of its plan to consume their yard as part of a street-widening program." Nonetheless, the Village refused to pay compensation. The district court found the takings claim unripe, but the circuit court reversed and remanded for further proceeding on the merits.

Ten years elapse since county's destruction of plaintiff's yard, to court case.

Panhandle Eastern Pipe Line Company

898 F.Supp. 1302 (S.D. Ind. 1995)

Interstate natural gas pipeline sued to prevent county from widening of public drain that would cause substantial economic consequences to the company by requiring it to modify pipelines at its own expense.

Three years elapse between submission of proposal, to court decision.

Resolution Trust Corporation v. Town of Highland Beach

18 F.3d 1536 (11th Cir. 1994)

Town initially adopted ordinance allowing for ultimate build-out of a planned unit development ("PUD") within ten years, or by August 8, 1990. Mayor issued letter to confirm completion date, and developer invested $8 million to prepare the site and begin construction in reliance on the city's determination. Four years later, on December 12, 1984, county decided to re-interpret ordinance and ruled that the completion date should be July 1, 1985, five years earlier than the original deadline. To no avail, developers argue repeatedly to the town board that it relied on the 1990 deadline, but the town informed that the PUD project was "dead." When developer could not meet the 1985 deadline, town downzoned its property to permit only lower densities compared to the initially approved PUD. Town argued takings claim wasn't ripe because it made no final decision on the project, but court rejected this argument and found a taking.

Fourteen years elapse since town granted first construction permit, to court's decision.

Christopher Lake Development Company v. St. Louis County

35 F.3d 1269 (8th Cir. 1994)

Plaintiff forced to litigate in both state and federal courts. Federal district court initially determined takings claim was not ripe, but circuit court remanded for further proceedings on the merits.

Seven years elapse between hearing on plaintiff's site plan, to court's decision. Date of submission of initial application not mentioned

Corn v. City of Lauderdale Lakes

771 F.Supp. 1557 (S.D. Fla. 1991), aff'd in part, rev'd in part and remanded, 997 F.2d 1369 (11th Cir. 1993), after remand, 95 F.3d 1066 (11th Cir. 1996)

District court initially found takings claim unripe; circuit court then reversed. District court then found a violation of substantive due process and never decided the merits of the takings claim; circuit court then reversed, finding no violation of substantive due process and remanded for further proceedings. Parties then focus on merits of takings claim. In 1996, circuit court ultimately decided on the merits that no taking occurred.

As of 1993, "the parties [had] been litigating over 8.5 acres for sixteen years." Three more years of litigation to address merits of takings claim.

Reahard v. Lee County

968 F.2d 1131 (11th Cir. 1992)

Owner sued county in state court alleging that county's designation of his property in land use plan as resource protection area was a taking under state and federal constitutions. County removed case to federal district court, which found that adoption of land use plan did constitute taking. Circuit court held that district court misapplied legal standard for partial takings and failed to make adequate factual findings that taking had occurred, and thus remanded for further proceedings.

Eight years elapse from county's action to zone plaintiff's land as non-developable open space, to court's decision.

McDougal v. County of Imperial

942 F.2d 668 (9th Cir. 1991)

District court abstained its jurisdiction and found inverse condemnation claim unripe. Circuit court addressed merits of inverse condemnation claim without discussing ripeness issue. Remanded for further proceedings for district court to determine on the merits whether a taking occurred.

Plaintiffs "have been embroiled in litigation with the County for most of the last twenty years."

Midnight Sessions, Ltd. . City of Philadelphia

945 F.2d 667 (3rd Cir. 1991)

No discussion of ripeness issues. Case does not involve typical development scenario, but denial of license to operate an adult dance hall.

Three years elapse form application for dance hall license, to court's decision.

Diaz v. City of Riverside

895 F.2d 1416 (9th Cir. 1990)

Property owners sued because ordinance significantly reduced density of property resulting in denial of economically viable use of their property.

Thirteen years elapse from plaintiff's initial submission of request for map amendment, to court's decision.

Del Monte Dunes at Monterey, Ltd. v. City of Monterey

920 F.2d 1496 (9th Cir. 1990), after remand, 95 F.3d 1422 (9th Cir., 1996), cert. granted, 118 S.Ct. 1359 (1998)

Developer submitted four plans over three years. Each successive submission designed to meet density restrictions recommended by planning board. Last plan developed with planning board staff assistance, but board and county nonetheless rejected plan. Ultimately, city refused to allow any development and jury awarded compensation for a taking. Approximately 17 years elapse between developer's initial submission, to ultimate review by U.S. Supreme Court.

Total of 17 years of negotation and litigation: Nine years elapse from submission of first plan to court's decision that claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits elapse until U.S. Supreme Court argument.

Hodge Capital Co. v. City of Sausalito

908 F.2d 976 (9th Cir. 1990)

Owner applied for conditional use permit to construct office building, but city planning commission denied proposal. The owner appealed to the city council with a revised plan. The city council vote was a tie, which had the effect of affirming the planning commission's denial. The owner petitioned the state court on the interpretation of the effect of the city council's tie vote, and also filed an action in the U.D. district court for a taking, which granted summary judgment to the city. Circuit court affirmed, simply assuming that a ripe claim existed.

Eight years elapse from application for permit, to court's decision.

No. 02-_____

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between its decisions in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)? The former *requires* landowners seeking compensation for regulatory taking of property to sue in the state courts and *prohibits* them from suing in U.S. District Court. However, the latter simultaneously *grants* municipal defendants in such cases the *absolute right to remove* them to U.S. District Courts — even though (a) removal is authorized by 28 U.S.C. § 1441(a) only if the plaintiff could have filed suit in federal court in the first instance which, under *Williamson County*, landowners may not; and even though (b) the combination of *Williamson County* and *City of Chicago* gives municipal defendants a veto power over the plaintiff's 7th Amendment right to a jury trial under *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

   The Court of Appeals agreed with Petitioner that this situation represents an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, explicitly concluding that how to resolve the conflict "is for the Supreme Court to say, not us."

2. When a city openly defies this Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by (1) imposing onerous conditions on a land use approval that are grossly disproportional to the burdens the proposed project will create, and (2) flatly refusing its duty to show any proportionality, has the landowner stated a claim on which relief can be granted by a U.S. District Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER

TABLE OF APPENDICES

PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin P. Kottschade respectfully prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision was filed on February 13, 2003, and is reported as *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). (App., p. 1.) A timely Petition for Rehearing and Rehearing En Banc was denied in an unreported order filed March 21, 2003. (App., p. 8.) The District Court's opinion (App., p. 9) is unreported.

JURISDICTION

This case was filed because the City of Rochester defied this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, this Court held that a municipality could constitutionally condition the issuance of a land development permit only if its conditions were roughly proportional to burdens the proposed development would place on the community, and if the municipality satisfied demonstrating that proportionality. Here, Rochester not only imposed conditions that were grossly disproportionate, and repeatedly refused Mr. Kottschade's requests to explore how the conditions related to his development.

Mr. Kottschade sued in U.S. District Court for these 5th Amendment violations. That court dismissed, believing *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) required Mr. Kottschade to sue in state court first. Mr. Kottschade relied on *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, this Court held that a city sued in state court had the

right to remove the case to federal court under 28 U.S.C. § 1441(a) because the plaintiff could have filed suit in federal court in the first instance. Mr. Kottschade therefore urged that *City of Chicago* modified *Williamson County*, for if a defendant can remove, then *perforce* the plaintiff must be able to file in federal court initially.

The District Court concluded that, *City of Chicago* notwithstanding, *Williamson County* controlled and dismissed the case. (App., p. 16-.) The 8th Circuit affirmed. Although it agreed with Mr. Kottschade that the situation was "anomalous" (App., p. 5), the Court refused to address the anomaly, concluding that how to resolve it "is for the Supreme Court to say, not us" (App., p. 5).

This Court's jurisdiction is under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1441(a):

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

Frank Kottschade, a long-time resident of, and developer in, the City of Rochester, Minnesota, sued under 42 U.S.C. § 1983 charging a regulatory taking of his property.

Mr. Kottschade sought to develop a townhouse project on a 16.4-acre parcel of land he acquired in 1992. After years of attempting to satisfy various city concerns (through four different development proposals), the city purported to grant a permit in June, 2000. However, it attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs *to each unit* — in a market where such homes sell for $125,000. Economically, it was an impossibility. Constitutionally, it was a taking.

Knowing that this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) allowed conditions only if they bore a rough proportionality to the burdens the proposed development would place on the community (and knowing that these conditions bore no relationship to his project whatever), Mr. Kottschade asked the city to explain the nexus and its proportionality. Even though *Dolan* placed the burden on the city to provide such an explanation, the city flatly refused. Twice. In writing.

Mr. Kottschade then filed this suit. The District Court dismissed (App., p. 17) and the 8th Circuit Court of

Appeals, albeit with some expressly voiced discomfort (App., p. 5), affirmed (App. p. 7). Thus, this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CONUNDRUM TO BE RESOLVED

A. Do State Or Federal Courts Have Initial (Or Sole) Jurisdiction Over Regulatory Taking Claims Under The 5th Amendment? And Who Decides?

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant in a state court action challenging the validity of land use regulations (under both state and federal law)[1] may remove that case to federal court. The rationale was that the plaintiff could have filed suit in federal court in the first instance (as the suit raised federal questions) and therefore 28 U.S.C. § 1441(a) granted the defendant the reciprocal right to remove the case. (522 U.S. at 164.) However, in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that such plaintiffs may *not* file such actions in federal court, but must first repair to the state courts and seek compensation there, before their claims can be deemed ripe for federal court litigation. (473 U.S. at 200.)

In fairness to this Court, it appears that the briefs in *City of Chicago* did not call *Williamson County* to the

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[1] The plaintiff in *City of Chicago* raised federal due process, equal protection and taking claims, as the trial court noted (1997 WL 171350) and this Court confirmed (522 U.S. at 160). It is the allegations in the complaint that determine federal jurisdiction. (E.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

Court's attention. The adversary system failed to disclose the doctrinal cliff toward which the Court was being urged. That is likely why neither the majority nor the dissent in *City of Chicago* mentions *Williamson County*. As a consequence, the constitutional law of regulatory takings now contains two contradictory jurisdictional holdings.

B. Confusion And Unfairness Of "Catch-22" Proportions Abound In The Wake Of Two Conflicting Decisions From This Court.

The interaction between these two holdings has given rise to a true "Catch-22" conundrum. No matter which court property owners choose to file suit, their municipal adversaries can muster decisional law saying that they should be in the other court system.

Under *Williamson County*, landowners are said to be barred from federal court while *simultaneously* — under *City of Chicago* — defendants *in the same cases* can force them into federal court on the bizarre theory that the plaintiffs could have sued there in the first place, although — under *Williamson County* — they could not. Adding insult to injury, some federal courts have dismissed such removed cases on the stunning ground that the plaintiffs (who were brought to federal court involuntarily by the defendants) should have pursued their action in state court.[2]

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[2] E.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003); *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 (11th Cir. 1994) (after two federal trials and two appeals). See *Anderson v. Charter Township. of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (landowner sued in state court, municipality removed to federal court, district court abstained and remanded state claims to state court; when property owner returned to district court to litigate federal claims, district court

The upshot is that either *City of Chicago* modified *Williamson County* or the Court has inadvertently created not only an insoluble anomaly in the law, but also a class of American litigants who are *de facto* pariahs — second class citizens whose sole access to federal court rests on the whim of the defendant, and who are at times subjected to a judicial "ping-pong game" whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court. (E.g., *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 [D. Kans. 1999]; *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 [N.D. Ill. 2000].)

Mr. Kottschade submits that this Court could not have intended to bring about such a grotesque procedural regime, and urges that the prevailing "ripeness mess"[3] cries out for a second look by this Court to reconcile *Williamson County* with *City of Chicago*, and inform aggrieved property owners whether they can *ever* have their federal constitutional cases heard on the merits in federal court.

C. The Unfairness And Confusion Created By This Jurisdictional Conflict Are Widely Recognized.

Courts and commentators expressed confusion and unhappiness with the jurisdictional problems created when *Williamson County* held that property owners could try their regulatory taking cases in federal court, but only after first "ripening" them in state court. (See *post*, pp. 22-24.)

City of Chicago exacerbated the situation. Lawyers

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dismissed the case under the *Rooker-Feldman* doctrine).

[3] See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. 195, 196, fn. 5 (1999).

from the ABA's State and Local Government Law Section, representing diverse clients, concluded after a weekend retreat devoted to this and related issues that either both parties or neither ought to have access to the federal courts:

> "The second and third recommendations deal with the apparent anomaly in effect, though probably not in intent, when *Williamson* is juxtaposed against *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). Under *City of Chicago*, governmental defendants can, and frequently do, remove takings claims initiated in state court to federal court under the federal removal statute. At the same time, under *Williamson*, plaintiffs who bring those very same claims in federal court are told they must litigate in state court. As a result, the defendants in takings claims have a choice of forum — state or federal — while takings plaintiffs under *Williamson* are apparently required to go only to state court." (*Report of Retreat on Takings Jurisprudence*, in *Taking Sides on Takings Issues* 568, 574 [ABA 2002; Thomas E. Roberts, ed.].)

The ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*. Mr. Kottschade asks this Court to take this opportunity to correct the anomalous state of regulatory takings jurisdictional jurisprudence.

II. THERE IS DIRECT CONFLICT BETWEEN TWO DECISIONS OF THIS COURT: *WILLIAMSON COUNTY* PRECLUDES PROPERTY OWNERS FROM SUING IN FEDERAL COURT FOR 5TH AMENDMENT REDRESS, WHILE *CITY OF CHICAGO* WELCOMES MUNICIPAL DEFENDANTS TO REMOVE THE SAME CASES TO FEDERAL COURT. THEY CANNOT OPERATE HARMONIOUSLY.

Simply put, *Williamson County* and *City of Chicago* are — as applied below — in direct conflict. *City of Chicago* is based on the even-handed rule of 28 U.S.C. § 1441(a), i.e., if the plaintiff could have filed suit in federal court but chose the state venue instead, then the defendant has the absolute right to remove the case to federal court. Thus, if *City of Chicago* is to be viewed as rational, Mr. Kottschade should have been permitted to file suit directly in federal court. The courts below, however, refused to apply *City of Chicago* because, in their view, until this Court itself reconciles it with *Williamson County*, then *Williamson County* mandates dismissal regardless of what *City of Chicago* may have said later. Under the lower courts' reading of this Court's decisions, only one of the parties to litigation like this has free access to federal court, while the other has none. [4] As summarized in a leading treatise:

> "While not put so starkly, the message for property owners seems to be: 'You can't be heard in federal court, but your opponents can.' " (Steven J. Eagle, *Regulatory Takings* 1091 [2d ed. 2001].)

That cannot be the law.

28 U.S.C. § 1441(a) restricts removal to:

". . . any civil action brought in a State court *of which the district courts of the United States have* <u>*original*</u>

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[4] That the *City of Chicago* complaint also contained due process and equal protection claims is of no moment. As Professor Kovacs has explained, the same Williamson County ripeness rule has been applied to those claims. (Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars of each].)

jurisdiction." (Emphasis added.)

Thus, unless the International College of Surgeons *could* have brought its regulatory taking case in U.S. District Court initially, based on that court's original jurisdiction, the City of Chicago *could not* have been permitted to remove the case to federal court. But had the International College of Surgeons filed initially in federal court, it would have received the same response as Mr. Kottschade: case dismissed. That has been the consistent lower court treatment since *Williamson County*. (See Delaney & Desiderio, *supra*, 31 Urb. Law. at 206-231 [collecting and analyzing in tabular form all federal land use cases decided between 1990 and 1998].)

In ruling that removal was proper, this Court concluded simply that, "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (*City of Chicago*, 522 U.S. at 528-529.) The Court was well aware of the momentous nature of its decision. Any doubt was dispelled by Justice Ginsburg's dissent, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsburg, J., dissenting.)

Here, the Courts below concluded that, until this Court expressly says otherwise, they would have to apply *Williamson County* and dismiss this case because it had not gone through state court on the way to federal court. (App., pp. 5, 16.) As the Court of Appeals put it, the result of this "perceived gap in Supreme Court jurisprudence" is "anomalous" (App., p. 5), but whether *City of Chicago*

authorizes any relief from this anomaly "is for the Supreme Court to say, not us" (App., p. 5).

It cannot be the rule that property owning plaintiffs are barred from federal court while municipal defendants in the same cases have a free pass into federal court whenever they like. The issue goes to jurisdiction. Property owners are said to be unable to file in federal court because the federal courts lack jurisdiction. (E.g., *Reahard*, 30 F.3d at 1415.) But jurisdiction cannot magically appear out of thin air merely because some municipal defendant wants it. Jurisdiction exists, or it does not. Yet *City of Chicago* and *Williamson County* now simultaneously answer the same jurisdictional question "yes" and "no." The decisions below make plain that lower courts will not address this "mess" without guidance. Clarification by this Court is necessary.

III. EVEN BEFORE THIS COURT ISSUED ITS SECOND — CONFLICTING — OPINION, LOWER COURTS HAD MADE A HASH OF A RULE THIS COURT DESIGNED AS "*NOT YET RIPE* FOR FEDERAL COURT," TURNING IT INTO A RULE OF "*NOT EVER* IN FEDERAL COURT."

A. The Premise Of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners concede (as they must) that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their

> complaints will be ripe and heard in the federal courts after their state suits are over." (Thomas Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which FIRST had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical discussion begins by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[5] Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially "ripe." *Williamson County* then says that, because of the lack of both a final administrative decision (not in issue here[6]) and the absence of an attempt to seek

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[5] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely deal with other Bill of Rights claims — for years. See, e.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 99th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[6] Here, the city granted Mr. Kottschade a permit, albeit subject to financially ruinous conditions, and refused any variances. Thus, in *Williamson County's* words, we know precisely "how [he] will be allowed to develop [his] property." (473 U.S. at 190.) As the court below pointed out, Mr. Kottschade — in contrast to *Williamson County* — had exhausted his administrative remedies (App., p. 5) and thus had obtained a

compensation in state court, ". . . respondent's claim is *not ripe*." (473 U.S. at 186; emphasis added.) Absence of ripeness necessarily means that the matter can be ripened.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrates that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it. That concept of a dilatory plea is crucial in analyzing the development of the law since then.

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
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> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ends as it began, with this conclusion:

> "In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners who satisfy

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final determination of what the city would approve.

Williamson County find, when attempting to file their now-ripened federal suits, that the door is barred by *res judicata* and collateral estoppel. (See *post*, pp. 16-17.)[7] Thus, the upshot is that this Court's endorsement of property owners' right to litigate in federal court after ripening their suits in state court has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. Its holding could have been simple and straightforward: "All takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain it, even though it involves the application of the federal Constitution." Period. Plainly, neither the Congress that enacted 42 U.S.C. § 1983 nor the Court that wrote *Williamson County* had that in mind. Quite the contrary. All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment cases in federal court is to "ripen" them by litigating first in state court.[8]

Williamson County's evident establishment of a system by which property owners could eventually litigate

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[7] As the 8th Circuit put it below, Mr. Kottschade was "justly" concerned about this likelihood. (App., p. 6; 319 F.3d at 1041.)

[8] E.g., Steven J. Eagle, *Regulatory Takings* 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411, 415 [1964].) As this Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) It is no different here.

B. Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners —Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].

Notwithstanding this Court's clear language, property owners have been *de facto* singled out for virtual exclusion from the federal court system for redress of their 5th Amendment grievances against local government agencies. As things stand now American land owners like Mr. Kottschade — unlike any other citizens — may *never* obtain federal adjudication of their federal rights.

1. Property owners are the only victims of Bill of Rights violations who are barred from seeking redress in federal court.

That property owners have been singled out is clear. (See, e.g., Eagle, *supra* at 1068-1070; Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 2 [1992]; Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) As one commentator concluded, "[t]he state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Paradoxically, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the Fifth Amendment. Federal court First Amendment cases abound, for example, in which the validity of local land use ordinances regulating, or zoning for, sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases. First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance[10]

Moreover, at the behest of aggrieved citizens, federal courts have involved themselves in the local

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[9] E.g., *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

[10] E.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

intricacies of city budget policy,[11] county law enforcement policy,[12] municipal policy governing the use of force during arrests,[13] county road acquisition policy,[14] municipal employment policy,[15] city medical care policy,[16] school district sexual abuse policy,[17] police department sexual harassment policy,[18] and even the question whether "extortion of outsiders, businessmen, or developers" was town policy.[19] As this Court once noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others. (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-192 [1959] [collecting cases] [retaining federal court jurisdiction over a state eminent domain case].)

The cited cases deal with parallel features of the Bill of Rights, routinely protected in federal court through 42

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11 *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*).

12 *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

13 *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. denied* 117 S.Ct. 1086 (1997).

14 *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

15 *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

16 *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

17 *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

18 *Gares v. Willingboro Township.*, 90 F.3d 720 (3d Cir. 1996).

19 *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

2. Doctrines of claim and issue preclusion have been misemployed by lower courts to undercut *Williamson County*'s "ripening" process.

The mechanism for keeping property owners out of federal court has been the combination of *Williamson County*'s requirement of state court litigation with *res judicata*, and collateral estoppel. The law is used as a diabolical trap. Once a property owner sues in state court, any attempt to follow *Williamson County*'s directive to *then* litigate the "ripened" 5th Amendment case in federal court is met by one or more of the preclusion doctrines and the case is summarily dismissed.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (E.g., *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-729 [3d Cir. 1989]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1002 (W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished Sixth Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof.

Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *supra*, 11 J. Land Use & Envtl. L. at 72.)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it granted property owners an opportunity to litigate their 5th Amendment cases in federal court. It is therefore apparent that the lower courts are undermining this Court's intent.[20] Plainly, the preclusion doctrines being used to bar federal court litigation were known to this Court when it decided *Williamson County*. Just as plainly, *Williamson County* established a system that permitted dual court litigation: first in state court, to exhaust the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. If the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and this Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson,* 146 F.3d at 1325, fn. 4.) It is time for this Court to review the way in which its *Williamson County* decision has been

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[20] This Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a State supreme court was not an acceptable substitute for full federal court litigation. (Compare App., p. 7, where the court below disagreed.) Besides, state courts often dispose of these cases on the basis of state law, so that seeking certiorari may not even be possible.

treated by the lower courts. Either the requirement of state court litigation should be eliminated, or it should have no preclusive impact on subsequent federal court litigation.

C. With Respect, There Is A Flaw At The Core Of *Williamson County* That Explains The Lower Court Confusion: Its Assumption That A 5th Amendment Taking Without Just Compensation Is Not Complete Until A State Court Certifies That The Local Agency Really Won't Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights to be incorporated into the 14th Amendment's Due Process Clause)[21] prohibits government from taking private property for public use unless it pays just compensation. Logically, a violation of that provision occurs as soon as government actions take private property and the municipality refuses to pay. There is nothing in either logic or the 5th Amendment to require that refusal to be certified by a state court before it is complete.

Therein lies *Williamson County*'s flaw. The opinion quite properly begins its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blends or blurs the distinction between acts of the agency that has actually committed the taking and the State that may or may not have provided a litigational process for seeking compensation. (473 U.S. at 195-196.)

But the *State* is not involved in 42 U.S.C. § 1983

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[21] *Chicago B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

cases like this one. States and their officials cannot be sued under section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. 1972 [2003]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue is whether the local entity — like the City of Rochester at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of both state and federal court litigation. Thus, the aggrieved property owners' adversaries ask: how can the plaintiff get a "second bite of the apple" by simply re-filing for the same relief on the same facts in the other court system?

The answer lies in the fact that, under *Williamson County*, the aggrieved property owners have no choice whatever — they *must* sue first in state court, even though they desire only one "bite" — and they want that one in the federal courts, the historical guardians of the federal Constitution — the same as other plaintiffs complaining of federal law violations.

The crux of the problem is *blurring the State legal system with the local agency defendant* and disregarding the plain words of the Constitution. Nothing in the 5th Amendment requires that. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court*."

The issue is not whether a state has countenanced the constitutional violation; the suit is not against the state. Rather, the issue is whether the particular defendant has committed it. 42 U.S.C. § 1983 forbids any person acting under color of state law from violating rights secured by federal law. When a city council — like Rochester's — prohibits viable economic use of property without any

pretext of compensation, it has violated Section 1983. The presence or absence of a state remedy has no bearing on whether the malefactor has done the deed.

Nor are other constitutional rights treated that way.[22] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law. The constitutional provision is the same 14th Amendment stricture: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [section 1983 suits are enforceable in federal court "*in the first instance*"] [emphasis added]; cf. *Screws v. United States*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation

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[22] *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. That is all Mr. Kottschade and others want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

is not ripe until a *state court* verifies that state law provides no remedy, then all Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Eagle, *supra* at 1070.)[23]

There is no need to sue in state court merely to confirm the non-payment. The non-payment is obvious; it is the reason for the suit. This can be seen in any regulatory taking case. In *City of Monterey*, 526 U.S. 687, for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process did not end for another 13 years. At no time — even after a compensatory judgment had been entered after trial — did the city offer to pay anything. Suit was not necessary to determine the lack of compensation.

Nor is a state court suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Here, for example, Mr. Kottschade directly told the city that its actions had taken his property and

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[23] See also Peter A. Buchsbaum, *Should Land Use Be Different: Reflections on Williamson County Regional Planning Board v. Hamilton Bank,* in *Taking Sides on Takings Issues: Public and Private Perspectives,* (A.B.A. 2002, Thomas E. Roberts ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

demanded that the city begin proceedings to condemn the land and compensate him. The city denied it. Must he now impose on the time of a state court seeking to have it say the obvious? To what end?

There is no need to require the victim to approach a third party (the state courts) in order to establish that she has a federal claim at all. That is a job for the federal courts. Worse, deferring to state courts is tantamount to granting state courts a veto over citizens' access to federal court, making them *de facto* federal court gatekeepers. On the contrary, this Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

D. Commentators Have Vied With Each Other Devising Ways To Disparage The Quagmire The Lower Courts Have Created In Their Applications Of *Williamson County*.

Even before *City of Chicago*, lower court applications of *Williamson County* were described by courts and commentators as "odd,"[24] "unpleasant,"[25] "unfortunate,"[26] "ironic,"[27] "unclear and inexact,"[28]

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24 *Fields v. Sarasota-Manatee Airport Auth*., 953 F.2d 1299, 1307, fn. 8 (11th Cir. 1992).

25 Roberts, *supra*, 24 Urb. Law. at 480.

26 *Fields v. Sarasota-Manatee Airport Auth*., 953 F.2d 1299, 1306, fn. 5 (11th Cir. 1992); Jan Laitos, *Law of Property Rights Protection* § 10.05[A][5], p. 10-25 (Aspen Publishers 1999).

"surprising,"[29] "worse than mere chaos,"[30] "dramatic,"[31] "misleading,"[32] an "anomaly,"[33] "paradoxical,"[34] "most confusing,"[35] a "source of intense confusion,"[36] "inherently nonsensical,"[37] "shocking,"[38] "absurd,"[39] "self-stultifying,"[40] "revolutionary,"[41] "nonsense,"[42] "draconian,"[43] "riddled with obfuscation and inconsistency,"[44] and thereby creating "a procedural

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27 Kathryn E. Kovacs, *supra*, 26 Ecology L.Q. at 20.

28 Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue* 67 (Island Press 1999).

29 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 67.

30 Freilich, *supra*, 31 Urb. Law. at 387.

31 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

32 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

33 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 479; Roberts, *supra*, 11 J. Land Use & Envtl. L. at 68.

34 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71; Stein, *supra*, 48 Vand. L. Rev. at 93.

35 Laitos, *supra*, p. 10-20.

36 Freilich, *supra*, 31 Urb. Law. at 387.

37 Freilich, *supra*, 31 Urb. Law. at 387.

38 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

39 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

40 Freilich, *supra*, 31 Urb. Law. at 387.

41 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

42 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 480.

43 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

44 Testimony of Prof. Daniel R. Mandelker before the House

morass,"[45] "conflict of decision,"[46] a "result [that] makes no sense,"[47] "doctrinal confusion,"[48] a "mess,"[49] a "trap,"[50] a "quagmire,"[51] a "Kafkaesque maze,"[52] and "a fraud or hoax on landowners."[53]

It is worth noting that many of these commentators are avowedly government-oriented in their views, yet they agree with landowners' criticisms and they clearly are troubled by the chaotic and unjust nature of the rule in question.

Enough time has passed and enough experience has been had in lower courts for this Court to examine the operation of the *Williamson County* rule and re-evaluate its conclusion that *de facto* denies land owners any opportunity

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Judiciary Committee, reproduced at 31 Urb. Law. 234, 236 (1999).

[45] Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 482.

[46] Freilich, *supra*, 31 Urb. Law. at 388; Meacham, *supra*, 32 Urban Lawyer at 240 ("The circuits have been divided on whether there is a way to avoid the Williamson trap, and the Supreme Court has sent conflicting messages.")

[47] Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 478.

[48] Freilich, *supra*, 31 Urb. Law. at 388.

[49] Delaney & Desiderio, *supra*, 31 Urb. Law. 195.

[50] David A. Dana & Thomas W. Merrill, *Property Takings* 264 (2002); Freilich, Wyker & Harris, *supra*, 31 Urb. Law. at 716; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998); Meacham, *supra*, 32 Urb. Law. 239; Meltz,. Merriam, & Frank, *supra* at 67.

[51] Kassouni, *supra*, 29 Cal. West. L. Rev. at 44.

[52] Kassouni, *supra*, 29 Cal. West. L. Rev. at 51.

[53] Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

whatever to try their *federal* constitutional claims in *federal* courts. As Professor Mandelker put it:

> "In my opinion, federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." (Mandelker, *supra*, 31 Urb. Law. at 236.)

Only this Court can end that distortion and bring some rationality to the jurisdictional aspects of regulatory takings law.

IV. AS A DIRECT RESULT OF LOWER COURT MISUSE OF *WILLIAMSON COUNTY*, AND NOW THEIR DISREGARD OF *CITY OF CHICAGO*, PROPERTY OWNERS IN 5TH AMENDMENT TAKING CASES HAVE NOT ONLY BEEN DENIED ACCESS TO FEDERAL COURTS TO PURSUE FEDERAL REMEDIES UNDER 42 U.S.C. § 1983, BUT ALSO DENIED THE 7TH AMENDMENT RIGHT TO A JURY GUARANTEED BY THIS COURT'S *CITY OF MONTEREY* DECISION.

Lower court actions barring property owners from federal court (except, when defendants invoke *City of Chicago* and remove state court litigation) have serious consequences: they deny aggrieved parties the ability to invoke civil rights jurisdiction under 42 U.S.C. § 1983 to have federal courts guard against local government incursions into constitutionally protected realms, and they deny property owners the 7th Amendment right to a jury trial that is provided in federal court, but generally denied in state courts in land use cases, in deciding governmental liability under section 1983. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 [1999].)

A. The *Williamson County* Rule, As Applied By The Lower Courts, Denies Property Owners The Protection Intended By 42 U.S.C. § 1983.

A Section 1983 case is a "species of tort liability,"[54] a statutorily created "constitutional tort"[55] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[56] with "broad and sweeping protection"[57] "to secure private rights against government encroachment"[58] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[59] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[60] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[61] and must be broadly and liberally

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54 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

55 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Servs*, 436 U.S. 658, 691 (1978).

56 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

57 *Lynch v. Household Fin. Corp*., 405 U.S. 538, 543 (1972) [quoting with approval].

58 *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

59 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

60 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

61 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

construed to achieve its goals.[62] Its "goals" are straightforward: **"to provide compensatory relief to those deprived of their *federal* rights by state actors"**[63] **by "interpos[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights*."**[64] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ."[65]

But in cases like the one at bench, property owners find this Court's holdings obverted. Instead of interposing the federal courts as the citizen's protector against local government, the system interposes state law as a barrier between the citizen and the federal courts.

Contrary to this Court's section 1983 holdings, property owners — and they alone — find the doors of the United States courts not merely hard to open, but barred. (See Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 477; Brian Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Property L.J. 73 [1988].)

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62 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

63 *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

64 *Mitchum*, 407 U.S. at 243; emphasis added.

65 *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

B. The Lower Courts' Application Of *Williamson County* Denies Property Owners Their 7th Amendment Right To A Jury Trial Under *City Of Monterey*.

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) made another major post-*Williamson County* change in regulatory taking law.

In *City of Monterey*, this Court held as a matter of first impression that plaintiffs in section 1983 litigation — specifically, property owners like the ones involved there and here — have a 7th Amendment right to a jury trial on the issue of liability. That, as this Court recognized in *City of Monterey*, 526 U.S. at 719, is in stark contrast to the practice in state courts generally, which don't submit regulatory taking liability issues to juries.[66] But the trial court in *City of Monterey* did, and this Court affirmed.

Others have recognized the potentially significant change this means for regulatory taking litigation. (E.g., Meacham, *supra*, 32 Urb. Law. at 240, 242-243.)

By denying Mr. Kottschade federal court access, the courts below denied his 7th Amendment right to obtain a jury determination of the city's liability. This Court could not have considered that issue when it decided *Williamson County* 17 years earlier. It merits consideration now.

CONCLUSION

American property owners have become the proverbial pea in a jurisdictional shell game. Unlike all other victims of federal constitutional violations, their

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[66] For a recent example of such refusal, see *Cumberland Farms v. Town of Groton*, 808 A.2d 1107 (Conn. 2002).

attempts to seek justice in federal court are rebuffed. They are told to sue in state court. When they do so, their adversaries can unilaterally remove the cases to federal court. Once removed, the plaintiffs find their removed cases dismissed (on motion of the removing defendants!) and told to litigate in state court — where they are filed in the first place. With the utmost respect, that isn't law; it is a parody of law usually found only in the legal humor sections of libraries. (See, e.g., Arthur Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Charles Scribner's Sons 1948].) In the process, lower federal courts have abandoned their traditional roles as guardians of the constitutional rights of American citizens, leaving them to wander through a procedural maze that has no federal exit.

Petitioner prays that certiorari be granted so that this "anomalous . . . gap in Supreme Court jurisprudence," as the court below gently called it, can be rectified.

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